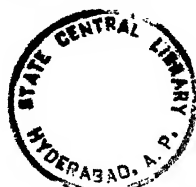


THE LAW OF HIRE
AND
HIRE-PURCHASE

THE LAW OF HIRE AND HIRE-PURCHASE INCLUDING CREDIT SALE

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PREFACE TO SECOND EDITION

ANOTHER edition of this book has become necessary by reason of the passing of the Hire-Purchase Act, 1938, which makes radical changes in the law relating to hire-purchase. Apart from the new Act, however, the time had come to embody in this treatise the many important decisions reported since 1932. The *format* of the book has been entirely altered—it is hoped to its advantage—and in addition references will now be found throughout to the English and Empire Digest and to Halsbury's Complete Statutes of England. The Table of Cases has also been amplified by giving references to all the reports in which the cases appear.

The new Act is printed in Appendix A, together with notes on each section, and it has, of course, been referred to in the text wherever its provisions are material to the topic being dealt with.

The new County Court Rules will be found in Appendix B. As they cannot appear in the practice books until the issues for 1940, the whole of the amendments have been printed, and not only those relating exclusively to hire-purchase.

Further, as the most important problems that have been found to arise in the past in connection with hire-purchase are in connection with the law relating to sale of goods and to distress, the Factors Act, 1889, the Sale

of Goods Act, 1893, and the Law of Distress Amendment Act, 1908, have been printed as Appendices, in the hope that this may assist practitioners, more particularly in the County Courts, where there is not ready access to libraries. Reference to the first two of these Acts will also be a frequent necessity when dealing with problems arising on credit-sale agreements.

Two new precedents, one of a hire-purchase agreement under the new Act, and one of a credit-sale agreement, have been added.

A. A. PEREIRA.

4, Paper Buildings,
Temple, E.C.4.
January, 1939.

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THE ENGLISH AND EMPIRE DIGEST

THE citation of each case in the text and table of cases is followed by a reference to the volume, page and number at which the case appears in the Digest. Thus :

Helby v. Matthews, [1895] A.C. 471 ; 3 Digest 93, 245.

HALSBURY'S COMPLETE STATUTES OF ENGLAND

Each reference to a public Act of Parliament or section of such Act in the text and table of statutes is followed by a reference to the volume and page at which the Act or section appears in Halsbury's Statutes. Thus :

Finance Act, 1907, s. 7 ; 16 Halsbury's Statutes 736.

THE ALL ENGLAND LAW REPORTS

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CHAPTER I

FORM AND CONSTRUCTION

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SECTION I—DEFINITIONS

Hire.—A contract of hire in relation to goods is one of the sub-divisions of the contract of bailment (*a viz.* that known as *locatio et conductio rei*, whereby one person (generally called the owner) lends to another person (usually called the hirer) goods for use for a definite or indefinite period, in return for the payment to the owner

(a) " Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee " (2 Bl. Com. c. 30, section 2).

" Bailment is a delivery of goods in trust on a contract, expressed or implied, that the trust shall be duly executed and the goods redelivered, as soon as the time or use for which they were bailed shall have elapsed " (Jones on Bailment, p. 117).

" A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust " (Story on Bailments, section 2).

of the price of the hiring (called indiscriminately hire or hire-rent or simply rent (*b*)).

Hire-Purchase.—By a contract of hire-purchase is meant a contract which, in addition to the terms of hire, provides that on the payment of rent for a certain period, or for a certain number of times, or on the payment of a certain sum after such payment of rent, or at some time during the hiring, the property in the goods hired shall (or may) pass from the owner to the hirer (*c*). Since the decision in *Helby v. Matthews* (*d*) the expression "hire-purchase agreement" has in the legal profession generally meant an agreement to hire with an option to purchase. It was not, however, until the passing of the Hire-Purchase Act, 1938, a legal term of art and was frequently loosely used to describe contracts, which were agreements to purchase by instalments at the conclusion of a period of hire (*e*), as well as those which merely gave the hirer an option to purchase, whether by payment of a lump sum or by completion of the instalments.

These two forms of agreement are in reality essentially

(*b*) Bailment for hire "is a contract whereby the use of a thing" is "stipulated to be given for certain reward" (Story on Bailments, section 368).

"The third sort [of bailment] is, when goods are left with the bailee to be used by him for hire. This is called *locatio et conductio*, and the lender is called *locator* and the borrower *conductor*" (*Coggs v. Bernard* (1703), 2 Ld. Raym. 909, at p. 913; 3 Digest 53, 7).

"*Locatio*, or *locatio-conductio*, *rei* is a contract by which the hirer gains a transient qualified property in the thing hired, and the owner acquires an absolute property in the stipend, or price, of the hiring" (Jones on Bailment, p. 85).

(*c*) "Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied. . . ." (Finance Act, 1907, s. 7; 16 Halsbury's Statutes).

In *Karflex v. Poole*, [1933] 2 K.B. 251; Digest Supp., Goddard J. says in effect that the classification in *Coggs v. Bernard* does not apply to hire-purchase contracts which contain not only a bailment but an "option of sale." By this phrase "option of sale" no doubt the learned judge intended to convey an option in the hirer to buy. There is no option in the owner. If the hirer observes the terms of his contract the owner must sell.

(*d*) [1895] A.C. 471, at p. 476; 3 Digest 93, 245.

(*e*) As in *Lee v. Butler*, [1893] 2 Q.B. 318; 3 Digest 92, 247.

different, as will be seen later when the legal struggle which culminated in the decision of the House of Lords in *Helby v. Matthews* comes to be discussed, although many of the terms of the agreements are frequently similar. Where there is an absolute binding obligation to buy, although only by instalments, then the contract is in essence a contract of sale, and the property passes either on delivery or at a time intended by the parties (f), and the so-called hirer (really a purchaser) can pass a good title under certain circumstances (g). Where there is only an option to purchase by the hirer at his election then the contract remains in essence a contract of bailment.

It is really immaterial what the agreements are called, however, as it is for the Court to determine what the real nature of the contract is and to look to the substance of it and not the words (h).

Now, by the Hire-Purchase Act, 1938 (i), which comes into force on the 1st January, 1939, and which is analysed in detail in Appendix A, a statutory definition has been created for such hire-purchase agreements as come within the categories laid down in section 1 of the Act. It is in the following terms:—

“ ‘Hire-purchase agreement’ means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made (j).”

(f) *McEntire v. Crossley Bros. Ltd.*, [1895] A.C. 457; 3 Digest 94, 249. *Helby v. Matthews* (*supra*).

(g) Factors Act, 1889, s. 9; 1 Halsbury's Statutes 40; Sale of Goods Act, 1893, s. 25 (2); 17 Halsbury's Statutes 626.

(h) *Maas v. Pepper*, [1905] A.C. 102; 7 Digest 6, 15; *Taylor v. Thompson*, [1930] W.N. 16; Digest Supp.

(i) *Post*, Appendix A. p. 272.

(j) *Ibid.*, s. 21 (1), *post*, p. 307.

The categories to which the Act relates (*h*) are as follows. All hire-purchase agreements in which the "hire-purchase price," *i.e.* the total sum payable by the hirer in order to complete the purchase of the goods, exclusive of any sum payable as a penalty or as compensation for damages for a breach of the agreement (*l*), does not exceed—

- (a) where the agreement relates to a motor vehicle (*m*) or railway wagon or other railway rolling stock, £50 ;
- (b) where the agreement relates to livestock (*n*) the sum of £500 ;
- (c) in any other case, £100.

The expression "hire-purchase agreement" must be construed accordingly (*h*).

It is to be observed that this definition would seem to make no distinction between these two forms of hire-purchase agreement, *viz.* the *Helby v. Matthews* form and the *Lee v. Butler* form, and both come within the operation of the Act. It is conceivable, however, that if on the true construction of a hire-purchase agreement in *Lee v. Butler* form, it appeared that it was the intention of the parties that the property was to pass to the nominal hirer on the making of the agreement (which is unlikely), then the agreement might come within the credit-sales clauses of the Act and not the hire-purchase clauses.

Credit-Sales.—By the Hire-Purchase Act, 1938, a new statutory form of contract of sale has been created, *viz.* "an agreement for the sale of goods under which the purchase price is payable by five or more instalments" (*o*). The categories to which the Act applies are : all credit-sale agreements under which the total purchase price, *i.e.* the

(*h*) See section 1 of the Act, p. 273 *post*.

(*l*) See definition, s. 21 (1), *post*, p. 307.

(*m*) "Motor vehicle" has the same meaning as in the Road Traffic Act, 1930, *i.e.* a mechanically propelled vehicle intended or adapted for use on roads.

(*n*) "Livestock" means horses, cattle, sheep, goats, pigs or poultry, *ibid.*, s. 21 (1).

(*o*) Hire-Purchase Act, 1938, s. 21 (1), *post* p. 307.

total sum payable by the buyer exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement (*p*), does not exceed the same sums, *i.e.* (a) £50, (b) £500 and (c) £100, in respect of the same classes, *i.e.* (a) motor vehicles, etc., (b) livestock, (c) "any other case," and the expression credit-sale agreement must be construed accordingly (*q*). It is to be observed that the above definition does not fix the time when the property is to pass or possession is to be given, and presumably these times must be determined by the ordinary rules under the Sale of Goods Act, 1893. It is submitted that the intention of the legislature was that in credit-sale agreements the property should pass on the making of the agreement, but it seems doubtful whether the Act has achieved that object in view of sections 17 and 18 of the Sale of Goods Act, 1893 (*r*). Further, an agreement for the sale of goods by five or more instalments in which possession was to be given at once but the property was not to pass till later, might be deemed to be a hire-purchase agreement within the Act, on the ground that it was an agreement "for the bailment of goods under which . . . the property in the goods will . . . pass to the bailee." If, on the other hand, possession was not to be given, it might well be an absolute Bill of Sale within the Bills of Sale Act, 1878 (*s*).

SECTION 2—FORM OF AGREEMENTS

(A) GENERALLY

A contract of hire or hire-purchase may be made verbally (*t*) (with due regard to the Statute of Frauds (*u*)),

(*p*) Hire-Purchase Act, 1938, s. 21 (1); *post*, p. 308.

(*q*) *Ibid.*, s. 1; *post*, p. 273.

(*r*) 17 Halsbury's Statutes 620, 621; *post*, p. 336.

(*s*) See *post*, p. 378.

(*t*) *Ex parte Brooks, In re Fowler* (1883), 23 Ch. D. 261; 5 Digest 757, 6579. This was a case in which a hire agreement was made verbally (see p. 262), though the case is not reported on that account. *Harl v. Wright* (1885), 1 T.L.R. 538; 3 Digest 95, 253. This was apparently an agreement in *Lee v. Butler* form, *i.e.* an agreement to purchase by instalments.

(*u*) See p. 8 *post*.

in writing, or under seal. Such a contract is, however, almost invariably in writing (v).

As from the 1st January, 1939, however, any hire-purchase agreement (w) and any credit-sale agreement under which the total purchase price exceeds £5 (x), coming within the scope of the Hire-Purchase Act, 1938, will be unenforceable by the owner or seller together with any guarantee relating thereto, and any security given by the hirer or buyer or guarantor, unless a note or memorandum of the agreement is made and signed by the hirer or buyer or by or on behalf of all other parties to the agreement. It would appear that the hirer or buyer must sign personally. In the case of a hire-purchase agreement, the owner will in addition be unable to enforce any right to recover the goods from the hirer.

The note or memorandum of a hire-purchase agreement must, in order to be enforceable, contain a statement of the cash price, that is, of the price at which the goods might have been purchased for cash (y), of the hire-purchase price, of the amounts of each instalment and of the date or mode of determining the date upon which each instalment is payable and a list of the goods sufficient to identify them (z). The note or memorandum of a hire-purchase agreement must also contain a notice which is at least as prominent as the rest of the note or memorandum in the terms prescribed in the Schedule to the Act (a). This notice purports to give the hirer some idea of his rights under the Act. Further, subject to the same penalty, a copy of the note or memorandum must be delivered or sent to the hirer within seven days of the making of the agreement. Similar requirements *mutatis mutandis* are necessary in the case of such credit-sale agreements as must be in writing, except that there is

(v) For precedents, see Appendix F *post*.

(w) Hire-Purchase Act, 1938, s. 2 (2), *post*, p. 276.

(x) *Ibid.*, s. 3 (2); *post*, p. 280.

(y) *Ibid.*, s. 2 (1); *post*, p. 276.

(z) *Ibid.*, s. 2 (2) (b); *post*, p. 277.

(a) *Ibid.*, Schedule; *post*, p. 310.

no statutory notice to be inserted (*b*). The Court has power, however, if it is satisfied that the hirer has not been prejudiced, to dispense with any of these requirements upon such terms as it thinks fit to impose, except the requirement that a note or memorandum of the agreement must be made and signed by all the parties.

There is another matter which by the Hire-Purchase Act, 1938, is required to be put into writing both in respect of all hire-purchase agreements to which the Act applies and also in respect of credit-sale agreements (under which the total purchase price exceeds £5), to which the Act applies, and that is the "cash price," *i.e.* the price at which the goods may be purchased for cash. This must be stated in writing by the owner to the prospective hirer or buyer, otherwise than in the note or memorandum of the agreement, before the hire-purchase agreement or credit-sale agreement is entered into, subject to disabilities similar to those already referred to (*c*). This requirement may, however, be dispensed with by the Court as in the case of those already mentioned. The requirement is, however, sufficiently complied with (*a*) if the hirer or buyer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached showing the cash price of each article or of the goods as a whole, or (*b*) if the hirer or buyer has selected the goods by reference to a catalogue, price list or advertisement which clearly stated the cash price (*d*).

Corporations.—The contracts of corporations, with certain exceptions, must at Common Law, in order to be enforceable either by or against the corporation (*e*), be under seal (*f*). The absence of the formality will not justify a corporation in keeping goods which have been

(*b*) Hire-Purchase Act, 1938, s. 3; *post*, p. 279.

(*c*) *Ibid.*, s. 2 (1) and s. 3 (1); *post*, pp. 276 and 279.

(*d*) *Ibid.*, ss. 2 and 3.

(*e*) *Kidderminster Corporation v. Hardwick* (1873), L.R. 9 Exch. 13; 13 Digest 390, 1163.

(*f*) 1 Wms. Saund. 616.

delivered under a contract which was not under seal (*g*). In small matters occurring often or in cases of urgency, a corporation may bind itself without a contract under seal (*h*). The rule as to corporations contracting under seal does not apply to trading corporations contracting for purposes connected with their objects (*i*).

Companies.—Speaking generally, companies registered under the Companies Acts may make, vary or discharge contracts in exactly the same way as private persons, that is to say where a deed or writing is required of an individual, it is also required of a company, and in cases where an individual may make a valid contract by parol so also may a company, through the agency of a person having express or implied authority to act for the company (*j*).

(B) CONTRACTS WHERE WRITING IS NECESSARY

Hire-Purchase Act, 1938.—The requirements of this Act in respect of the necessity for writing in the formation of hire-purchase agreements and credit-sale agreements have already been referred to (*l*).

Statute of Frauds.—By the Statute of Frauds a contract which is not to be performed within one year from the making of it must be in writing, or there must be a memorandum or note of it, signed by the party to be charged (*m*). The true construction of this statutory requirement, with regard to contracts which do not

(*g*) *Clarke v. Cuckfield Union Guardians* (1852), 21 L.J. Q.B. 349; 13 Digest 393, 1184.

(*h*) *Laxford v. Billericay Rural Council*, [1903] 1 K.B. 772, C.A. per Matthew, L.J., at p. 785; 13 Digest 394, 1193.

(*i*) *Church v. Imperial Gas Light & Coke Co.* (1838), 6 Ad. & El. 846, 861; 13 Digest 285, 169.

(*j*) Companies Act, 1929, s. 29 & 30; 2 Halsbury's Statutes 790, 791.

(*l*) *Ante*, pp. 5-7.

(*m*) Statute of Frauds, 1677, s. 4; 3 Halsbury's Statutes 583. The essential words of the section are as follows:—"No action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

comply with it, is not to render such contracts void or illegal, but is to render the kind of evidence required, indispensable when it is sought to enforce the contract (*n*). A hiring agreement for a term longer than a year must, therefore, be in writing in order to conform with the Statute of Frauds (*o*), even where, by the custom of the trade, the agreement is terminable at any time on certain terms, or where the agreement provides for termination by notice during the year (*p*). The requirements of the Statute do not apply where the contract may possibly be performed within the year (*q*), nor where one of the parties must or may wholly perform his part of the contract within the year (*r*). If, therefore, the hiring is for an indefinite time, as is the case in most modern hire-purchase agreements, and provides for termination *at any time* by the hirer either by returning the chattels hired, or

(*n*) *Maddison v. Alderson* (1883), 8 App. Cas. 467, *per* Lord Blackburn, at p. 488; 12 Digest 161, 1176.

(*o*) *Milsom v. Stafford and Others* (1899), 80 L.T. 590; 12 Digest 120, 776, where it was held by Smith, Williams, and Romer, L.J.J., that a contract for the hire of gas plant for three years was within the Statute; *Dollar v. Parkington* (1901), 84 L.T. 470; 12 Digest 124, 813, where Darling, J., held that a hiring agreement for a year from the day after that on which the agreement was made was within the Statute; *Birch v. Earl of Liverpool* (1829), 9 B. & C. 392; 12 Digest 125, 827, where a contract whereby a coachmaker agreed to let a carriage for a term of five years in consideration of receiving an annual payment for the use of it was held to be within the Statute, though a custom of the trade to determine such a contract at any time by paying a year's hire was proved. The decision in *Dollar v. Parkington* (*supra*) is, however, apparently overruled by *Smith v. Gold Coast & Ashanti Explorers Ltd.*, [1903] 1 K.B. 285; affirmed [1903] 1 K.B. 538, C.A.; 12 Digest 124, 814, although it was not cited in that case. Nor was *Bracegirdle v. Heald* (1818), 1 B. & A. 722; 12 Digest 123, 806, on which Darling, J., relied. It does not seem, however, to support his decision, as it concerned a contract made on May 27th to commence on June 30th.

(*p*) *Dobson v. Collis* (1856), 1 H. & N. 81; 12 Digest 124, 817; *Re Pentegwinea Fuel Co., Ex parte Acraman* (1862), 31 L.J. Ch. 741, C.A.; 12 Digest 119, 774; *Lavalette v. Riches* (1908), 24 T.L.R. 336; 12 Digest 120, 785.

(*q*) *Souch v. Strawbridge* (1846), 2 C.B. 808, *per* Tindal, C.J., at p. 815; 12 Digest 121, 793; *McGregor v. McGregor* (1838), 21 Q.B.D. 424, C.A., *per* Lord Esher, M.R., at p. 429; 12 Digest 121, 797; *Lavalette v. Riches* (*supra*).

(*r*) *Cherry v. Heming* (1849), 4 Exch. 631; 12 Digest 122, 802; *Donellan v. Read* (1832), 3 B. & Ad. 899; 12 Digest 122, 801; see also *Reeve v. Jennings* (1910), 102 L.T. 831; 12 Digest 123, 805.

by purchasing them by payment of a lump sum, then on the authorities the agreement should be outside the statute (s).

Sale of Goods Act, 1893.—By the Sale of Goods Act, 1893 (t), a contract for the sale of any goods of the value of £10 or upwards is not enforceable by action unless the buyer shall accept (u) part of the goods so sold, and actually receive the same or give something in earnest to bind the contract or in part payment (v), or unless some note or memorandum in writing of the contract be made and signed by the party to be charged in that behalf (w). This enactment applies to those so-called hire-purchase agreements which are in fact agreements to purchase by instalments and not hiring agreements, where the value of the goods is £10 or more (x). It should be borne in mind, however, that where such agreements are not to be performed within one year from the making of them, (and this feature in fact applies to the majority of them), the fact that there has been part performance by payment or acceptance, which would have been effectual to take the contract out of the scope of this section of the Sale of Goods Act, 1893, on the question of value, will not avail to enable a signed memorandum to be dispensed with or exclude the operation of section 4 of the Statute of Frauds, in respect of the question of time (y).

(s) *Lavalette v. Riches* (1908), 24 T.L.R. 336; 12 Digest 120, 785.

(t) Appendix D., *post*.

(u) The Sale of Goods Act, 1893, s. 4 (3); 17 Halsbury's Statutes 614, provides that there is an acceptance of goods when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not. On this point see *Page v. Morgan* (1885), 15 Q.B.D. 228; 39 Digest 371, 94; *Taylor v. Great Eastern Railway Co.*, [1901] 1 K.B. 774; 39 Digest 398, 347.

(v) *Norton v. Davison*, [1899] 1 Q.B. 401, C.A.; 39 Digest 383, 206; *Davis v. Phillips, Mills & Co.* (1907), 24 T.L.R. 4; 39 Digest 383, 207.

(w) The Sale of Goods Act, 1893, s. 4 (1); 17 Halsbury's Statutes 613, replacing s. 17 of the Statute of Frauds.

(x) As to credit-sale agreements, see Hire-Purchase Act, 1938, s. 3, and *ante*, pp. 6 and 7.

(y) *Prested Miners, etc. v. Garner, Limited*, [1910] 2 K.B. 776, affirmed 1911, 1 K.B. 425, C.A.; 12 Digest 120, 777.

A detailed examination of the numerous decisions relating to the requirements of these two last-mentioned Acts, as to the form of the memorandum or signature, etc., does not come within the scope of this book, and the reader should refer to the standard treatises on Contract and Sale of Goods. It will be found in practice that there are very few cases in which it is not preferable, even if it is not now essential, that a hire-purchase agreement should be in writing. It is desirable, as a rule, that not only hire-purchase agreements, but ordinary hiring agreements should be reduced into writing and signed by both parties. Apart from technical reasons it will save a great deal of possible dispute as to what the parties intended; further, where a written agreement is in clear and unambiguous terms a party cannot be heard to say that he did not intend to enter into it, unless he be blind or illiterate or the nature of the document was misrepresented to him and there was no negligence on his part in signing it (z).

It is not necessary that the signatures should be attested, nor if they are attested, that the attesting witness should be called to prove them, if other proof be available (a).

The signature of the hirer should be obtained before the goods are delivered, as in cases of hire or hire-purchase coming within section 4 of the Statute of Frauds, if after delivery the hirer refuses to sign the agreement, the owner cannot rely on the doctrine of part performance as taking the agreement out of the Statute, as the equitable doctrine of part performance only relates to land (b) and he cannot therefore sue on the verbal agreement, or obtain specific performance of it, or other equitable remedies, granted in

(z) *Falck v. Williams*, [1900] A.C. 176, P.C.; 12 Digest 92, 561; *Tamplin v. James*, [1880] 15 Ch. D. 215, C.A.; 35 Digest 101, 84. *Howatson v. Webb*, [1908] 1 Ch. 1, C.A.; 35 Digest 71, 686; *Van Praagh v. Everidge*, [1903] 1 Ch. 434; 35 Digest 101, 86.

(a) Criminal Procedure Act, 1865, s. 7; 8 Halsbury's Statutes 229.

(b) See Halsbury's Laws of England (2nd Ed.) Vol. VII, p. 131.

respect of contracts relating to the sale of land, where there has been part performance (c).

In such cases, if the hirer were to commit a breach of the verbal agreement the owner would be reduced to retaking possession of his goods—if he could do so without committing trespass or a forcible entry—or suing in detinue or conversion on his Common Law rights. If the hirer made no breach of the verbal agreement, the owner would have to be satisfied that things were no worse as the verbal agreement would not be void, but merely unenforceable.

On and after the 1st January, 1939, in the case of a hire-purchase agreement to which the Hire-Purchase Act, 1938 (d) applies, the position would be even worse, since by section 2 of the Act (e) not only is the hire-purchase agreement itself unenforceable but so also is any other right to recover the goods from the hirer, and any contract of guarantee relating to the agreement; and no security given by a hirer in respect of money payable under the hire-purchase agreement or given by a guarantor in respect of such a guarantee as is mentioned above is enforceable against the hirer or guarantor by any holder thereof. In fact the owner might as well make up his mind at once to the loss of his goods.

Provisions of a similar severe character are enacted by section 3 of the Act in relation to credit-sale agreements to which the Act applies, in which the total purchase price exceeds £5, save that it is not provided that any other right to recover the goods shall be unenforceable, another argument in support of the view that it was the intention of the Legislature that in a credit-sale agreement the property in the goods should pass to the buyer on the making of the agreement.

(c) *Britain v. Rossiter* (1879), 11 Q.B.D. 123; 12 Digest 123, 810 : *Dollar v. Parkington* (1901), 84 L.T. 470; 12 Digest 124, 813.

(d) Appendix A, *post*, p. 272.

(e) *Post*, p. 276.

(C) GUARANTEES

Guarantees.—As to guarantees generally, reference should be made to the usual textbooks. It is quite impossible within the scope of this book to do more than deal with such points in relation to guarantees as are likely to be of importance in the case of a hiring or hire-purchase agreement. It is a very usual practice in the case of hiring or hire-purchase agreements, where the proposed hirer is not a householder or is in the opinion of the owner in some other respect not a completely satisfactory customer, to obtain the guarantee of a substantial person to the obligations of the hirer. This guarantee, or some memorandum of it, must be in writing and signed by the party to be charged or his duly authorised agent or it will be unenforceable (*f*). It may be given in the hire-purchase agreement to which the guarantor then becomes a party, or by a separate instrument. Every guarantee not under seal must be supported by a valuable consideration (*g*), and therefore the mere existence of the liabilities of the hirer under a hire-purchase agreement already entered into is not sufficient (*h*). In such a case there must be a new consideration. The signature of the guarantor to the guarantee should therefore always be obtained before or contemporaneously with the making of the hire-purchase or other agreement. But the consideration for a guarantee need not be a direct benefit to the guarantor (*i*) and it may consist in *e.g.* the supplying of a third person on hire, or hire-purchase or under a credit-sale agreement with goods at the guarantor's request.

Although there must be consideration to support a

(*f*) Statute of Frauds, 1677, s. 4; 3 Halsbury's Statutes 583.

(*g*) *Barrell v. Trussell* (1811), 4 Taunt. 117; 26 Digest 44, 292.

(*h*) 1 Wms. Saund. 6th Ed., 211C, note 1; and see *Wigan v. English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291, 297; 12 Digest 212, 1701.

(*i*) *Ex parte Minet* (1807), 14 Ves. 189, *per* Lord Eldon, L.C., at p. 190; 26 Digest 18, 71.

guarantee, it is provided by the Mercantile Law Amendment Act, 1856 (*g*), that the mere omission to state the consideration on the face of the document will not by itself invalidate the guarantee.

Normally any material variation in the terms of the contract between the creditor and principal debtor will discharge the guarantor (*k*), but this result may be excluded by the form of the guarantee (*l*). In the case of *British Motor Trust Co., Ltd. v. Hyams* (*m*), a hirer entered into two agreements with the plaintiffs for the hire-purchase of two vehicles and the defendant guaranteed the hirer's payments thereunder, the guarantee in each case providing that the guarantee should not be avoided by any "variation in the terms" of the agreement. The hirer fell into arrears with his instalments and the plaintiffs entered into a new agreement with him whereby the old agreements were consolidated and both vehicles were to be treated as hired together, and the hirer could not acquire the property in either unless he paid all the instalments in respect of both. The hirer again fell into arrear and the plaintiffs sued the guarantor. It was held that the new agreement was only a variation of the old agreements and not such a new agreement as would release the guarantor, and the latter was accordingly liable.

A binding agreement between the creditor and the principal debtor, to give time to the latter, will discharge the guarantor if made without his consent and whether he be prejudiced thereby or not (*n*). As a hire-purchase agreement is one and indivisible, time given in respect of one instalment of such an agreement discharges the guarantor entirely and not merely as to the instalment in

(*g*) 3 Halsbury's Statutes 585.

(*k*) *Blest v. Brown* (1862), 4 De G.F. & J. 367, at p. 376; 26 Digest 108, 759.

(*l*) *Holme v. Brunskill* (1878), 3 Q.B.D. 495, C.A.; 36 Digest 161, 1276.

(*m*) (1934), 50 T.L.R. 230; Digest Supp.

(*n*) See the cases set out in Halsbury's Laws of England (2nd Ed.) Vol. XVI, p. 143, note.

respect of which the time was given (*o*). On the other hand, for the same reason the guarantor cannot arbitrarily revoke his guarantee during the course of the hiring or hire-purchase agreement (*p*).

If a transaction is fictitious in the sense that it purports to be a hire-purchase agreement but is in reality a cloak to a bill of sale, as in the case of *In re Watson, Ex parte Official Receiver in Bankruptcy* (*q*), not only is the hirer entitled to avoid it, but any guarantor of the hirer's obligations is discharged (*r*), but it would appear that guarantors of a hire-purchase agreement entered into by a company *ultra vires*, but in the belief that it was *intra vires*, and *bona fide*, are liable on their guarantees (*s*).

Where a document purports to guarantee a contract by an infant which is void and incapable of ratification by reason of the Infants Relief Act, 1874 (*t*), or otherwise, it is not a guarantee, but the so-called guarantor is treated as having acted as a principal and as having incurred a principal's liability (*u*), and the document as being an indemnity.

As soon as the principal debtor has made default, the liability of the guarantor arises (*v*), and notice of the default need not be given to the guarantor (*w*), the surety being

(*o*) *Midland Motor Showrooms v. Newman*, [1929] 2 K.B. 256; Digest Supp.; *Croydon Gas Co. v. Dickenson* (1876), 2 C.P.D. 46; 26 Digest 158, 1200, distinguished.

(*p*) *Lloyd's v. Harper* (1880), 16 Ch. D. 290 C.A.; 26 Digest 80, 571. *Re Crace, Balfour v. Crace*, [1902] 1 Ch. 733; 26 Digest 208, 1630.

(*q*) (1890) 25 Q.B.D. 27; 7 Digest 6, 14.

(*r*) *Brown v. Blaine* (1884), 1 T.L.R. 158; 7 Digest 16, 71; *Chapleo v. Brunswick Permanent Building Society* (1881), 6 Q.B.D. 696; 26 Digest 97, 671. But see *Yorkshire Railway Wagon Company v. Maclure* (1882), 19 Ch. D. 478, 490; 26 Digest 17, 54, overruled on appeal, but on a different point.

(*s*) *Garrard v. James*, [1925] 1 Ch. 616; 26 Digest 98, 675.

(*t*) 9 Halsbury's Statutes 784.

(*u*) *Harris v. Huntbach* (1757), 1 Burr. 373; 26 Digest 39, 254; *Duncomb v. Tickridge* (1648), Aleyn. 94; 28 Digest 169, 266; *Wauthier v. Wilson* (1912), 28 T.L.R. 239, C.A.; 26 Digest 97, 672.

(*v*) *Belford Union Guardians v. Pattison* (1856), 11 Exch. 623; 26 Digest 18, 574.

(*w*) *Cutler v. Southern* (1667), 1 Saund. 116; 26 Digest 243, 1891; *Carter v. White* (1883), 25 Ch. D. 666, C.A.; 26 Digest 68, 479.

liable without being requested to pay (*x*), in the absence of a stipulation in the contract (*y*) or to be implied from the circumstances (*z*) that a demand is necessary (*a*). As to the stamping of guarantees, see next section.

Hire-Purchase Act, 1938.—The position of guarantors of hire-purchase agreements and credit-sale agreements to which the new Act applies has been considerably affected by some of the provisions of the Act and it may be convenient to refer to those provisions here.

By section 2 (2)(b) it is provided that on failure of the owner to comply with the provisions as to statement of the cash price and as to the formalities of the agreement he shall not be entitled to enforce (*inter alia*) any contract of guarantee relating to the agreement, and any security given by a guarantor in respect of money payable under such guarantee, shall not be enforceable against the guarantor by any holder. Similar provisions (*mutatis mutandis*) are contained in section 3 (c) in relation to credit-sale agreements. These provisions are subject to the power of the Court to give relief to the extent set out in the provisos to these two sections.

By section 11 (d) of the Act it is provided that where one-third of the hire-purchase price has been paid or tendered, whether by the hirer or guarantor, the owner shall not be entitled to enforce any right to recover possession of the goods otherwise than by action, and if he acts in contravention of this provision, it is enacted by section 11 (2) (b) that "any guarantor shall be entitled to recover from the owner in an action for money had and received all sums paid by him under the contract of guarantee or under any security given by him in respect thereof."

(*x*) *Hitchcock v. Humphrey* (1843), 5 Man. & G. 559; 26 Digest 70, 495.

(*y*) *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300; 26 Digest 68, 482.

(*z*) See *Morten v. Marshall* (1863), 9 Jur. N.S. 651; 26 Digest 78, 560.

(*a*) *Payne v. Ives* (1823), 3 Dow. & Ry. K.B. 664; 26 Digest 185, 1426.

(b) Appendix A, *post*, p. 276.

(c) *Ibid.*, p. 279.

(d) *Ibid.*, p. 291.

By section 12 (e) it is provided that any guarantor of a hire-purchase agreement must be made a party to any action commenced where section 11 applies, and after such an action has been commenced the owner must not take any step to enforce payment of any sum due under the guarantee except by claiming it in the action.

Under subsection (4) (b) of section 12 the Court, in making any order under that subsection, must consider the means of the guarantor and the propriety of any condition affecting the guarantor.

By section 13 (1) (f) it is provided that after the making of an order by the Court for the postponed delivery of the goods, under section 11, (a) no further sum is to be paid by the guarantor except in accordance with the terms of the order, and (b) the Court may modify the terms of the contract of guarantee to meet any variation of the terms of payment, and by subsection (4) may at any time during the postponement vary the order and the terms of the contract of guarantee.

Section 14 (2) (g) protects the guarantor in cases where the owner having recovered from a guarantor a sum of money under what is usually referred to as "the compensation for depreciation" clause subsequently seeks to recover the goods in an action to which section 12 (h) applies.

By section 20 (2) some of the above provisions apply to agreements entered into before the 1st January, 1939, when the Act comes into force, *e.g.* section 11 so far as it relates to the recovery of possession of goods after the commencement of the Act, and sections 12, 13 and 14 so far as they relate to actions commenced after the commencement of the Act.

Section 21 (1) (j) contains a definition of contract of

(e) Appendix A, *post*, p. 293.

(f) *Ibid.*, p. 297.

(g) *Ibid.*, p. 300.

(h) *Ibid.*, p. 293.

(i) *Ibid.*, p. 305.

(j) *Ibid.*, p. 307.

guarantee which is important. It is as follows: "Contract of Guarantee" means in relation to any hire-purchase agreement or credit-sale agreement, a contract, made at the request express or implied of the hirer or buyer, to guarantee the performance of the hirer's or buyer's obligations under the hire-purchase agreement or credit-sale agreement and the expression "guarantor" shall be construed accordingly.

It is to be observed that this definition carefully excludes the guarantees so commonly given by dealers to finance companies. The hirer or buyer in most cases does not even know of the existence of such a guarantee.

SECTION 3—THE STAMP ON THE AGREEMENT

The stamping of hire-purchase agreements in which the value of the obligations undertaken by the agreement (*k*) is £5 and upwards, is now governed by section 7 of the Finance Act, 1907 (*l*), which varies the provisions of the Stamp Act, 1891, and the effect of this section is that all such hire-purchase agreements if under hand must be stamped with a sixpenny stamp and if under seal, with a ten-shilling stamp. The distinction between hire-purchase agreements which impose an absolute obligation to buy as in *Lee v. Butler* (*m*) (which were formerly exempt as agreements for sale under exemption 3 of the First Schedule of the Stamp Act, 1891 (*n*)) and those which merely give an option to buy, as in *Helby v. Matthews* (*o*) is no longer of importance from the point of view of stamping, as both require the same stamp.

The Finance Act, 1907, s. 7, reads as follows:—

"Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person

(*k*) *Baldwin v. Alsager* (1844), 13 M. & W. 365; 39 Digest 271, 559; *Pemberton v. Vaughan* (1847), 10 Q.B. 87; 39 Digest 272, 570.

(*l*) 16 Halsbury's Statutes 736.

(*m*) [1893] 2 Q.B. 318; 3 Digest 92, 241.

(*n*) 16 Halsbury's Statutes 659.

(*o*) [1895] A.C. 471; 3 Digest 93, 245.

to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal (or in Scotland with a clause of registration), as a deed, as the case requires, and the exemption numbered (3) under the heading 'Agreement or any Memorandum of Agreement' in the First Schedule to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply in the case of any such instrument."

Under the Stamp Act, 1891, First Schedule, an agreement or any memorandum of an agreement made in England or Ireland under hand only, or made in Scotland without any clause of registration, not otherwise specifically charged with any duty, whether the same be only evidence of a contract or obligatory upon the parties from its being a written instrument, requires a sixpenny stamp.

Exemption (3), under the heading "agreement or memorandum of agreement" in the First Schedule to the Act, is as follows:—

"Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise."

It is this exemption which does not now apply to an instrument of hire-purchase which amounts to an agreement to buy. Although credit-sale agreements are also agreements to buy, it appears that the Inland Revenue authorities are insisting on their being stamped under the heading Bond Covenant or Instrument in the First Schedule to the Stamp Act, 1891, as being the only or principal or primary security for any sum or sums of money at stated periods. The duty is *ad valorem* and is denoted by an impressed stamp.

Another exemption under the above heading of "Agreement," Exemption (1):—

"Agreement or memorandum the matter whereof is not of the value of £5,"

and it is to be noted that s. 7 of the Finance Act, 1907, does not exclude the application of this exemption to hire-purchase agreements, and, therefore, a hire-purchase

agreement or simple hire agreement under hand only in which the total of all the instalments payable thereunder is less than £5 is exempt from duty.

The value referred to is not that of the goods themselves but of the obligation undertaken by the agreement (*p*).

How Denoted.—The duty of sixpence may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed (*q*). An instrument the duty upon which is required or permitted by law to be denoted by an adhesive stamp is not deemed duly stamped with an adhesive stamp unless the person required by law to cancel the adhesive stamp, *i.e.*, the person by whom the agreement is first executed (*r*), cancels it by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp by placing on it the date of cancellation alone, or other marks of a defacing nature (*s*). If upon the face of the document everything appears to be in order, there is a presumption that the regulations have been complied with, but this presumption may be rebutted by evidence (*t*). A person who is required by law to cancel a stamp and neglects or refuses to do so is liable to a fine of £10 (*u*).

A ten-shilling stamp duty can be denoted by an impressed stamp only (*v*).

Simple Hiring Agreement.—A hiring agreement, as distinct from a hire-purchase agreement, if under hand, is chargeable with the duty of sixpence, (if under seal with a

(*p*) *Baldwin v. Alsager* (1844), 13 M. & W. 365 ; 39 Digest 271, 559 ; *Pemberton v. Vaughan* (1847), 10 Q.B. 87 ; 39 Digest 272, 570.

(*q*) Stamp Act, 1891, s. 22 ; 16 Halsbury's Statutes 625.

(*r*) *Ibid.*

(*s*) Stamp Act, 1891, s. 8 (1) ; 16 Halsbury's Statutes 620 ; *McMullen v. "Sir Alfred Hickman" Steamship, Limited* [1902], 71 L. J. Ch. 766 ; 39 Digest 264, 481.

(*t*) *Bradlaugh v. De Rin* (1868), L.R. 3 C.P. 286 ; 39 Digest 254, 387 ; *McMullen v. "Sir Alfred Hickman" Steamship, Limited*, *supra*.

(*u*) Stamp Act, 1891, s. 8 (3) ; 16 Halsbury's Statutes 620.

(*v*) Stamp Act, 1891, s. 2 ; 16 Halsbury's Statutes 618.

duty of ten shillings), if the instalments are not payable in advance, and with an *ad valorem* duty under the head "Bond, Covenant, etc." (*w*), if the instalments of hire are payable in advance.

Guarantee.—It frequently happens that owners require a guarantee for the due performance of the terms of a hire-purchase agreement. It is to be observed that if the guarantor joins in the hire-purchase agreement so that there is only one transaction, no second stamp is required (*x*). If the guarantee is a separate transaction or document, whether on the same piece of paper or not, then it must be separately stamped (*y*). It is desirable that such a guarantee, when given by a tenant of premises where the goods are going to be placed, should be given by a separate document, to obviate the possibility of the point being raised that the goods are "comprised in a hire-purchase agreement made by the tenant (*z*)."

A guarantee of a hire-purchase agreement, the matter whereof is of the value of £5 and upwards, must be stamped with a sixpenny stamp (*a*) unless it is under seal. When the guarantee is under seal a stamp of ten shillings is imposed (*b*). A guarantee for the payment of goods to be supplied to another on sale is exempt from stamp duty (*c*).

(*w*) See the Stamp Act, 1891, First Schedule, noted *supra*; see also *National Telephone Company v. Commissioners of Inland Revenue*, [1900] A.C.1; 39 Digest 276, 608; *Clifford v. Commissioners of Inland Revenue*, [1896] 2 Q.B. 187; 39 Digest 252, 372; *County of Durham, etc. v. Commissioners of Inland Revenue*, [1909] 2 K.B. 604; 39 Digest 276, 613.

(*x*) *Price v. Thomas* (1831), 2 B. & Ad. 218; 39 Digest 258, 424 (surety joining with tenant in covenant for payment of rent); *Worthington v. Warrington* (1848), 5 C.B. 635; 40 Digest 81, 631 (lease with option to purchase).

(*y*) *Wharton v. Walton* (1845), 7 Q.B. 474; 26 Digest 51, 352. See Stamp Act, 1891, First Schedule; 16 Halsbury's Statutes 656.

(*z*) See *post* p. 183, and the dictum of Darling, J., in *Shenstone & Co. v. Freeman*, [1910] 2 K.B. 84; 18 Digest 305, 420. It is doubtful, however, whether there is anything in the point.

(*a*) Stamp Act, 1891, Schedule I, "Agreement"; 16 Halsbury's Statutes 659.

(*b*) *Ibid.*, "Deed"; 16 Halsbury's Statutes 669.

(*c*) *Ibid.*, Exemption (3) to Heading "Agreement." See also cases set out in Halsbury's *Laws of England* (2nd Ed.), Vol. XVI, p. 51, note(d).

Duplicates.—Duplicates or counterparts of the above agreements are not deemed duly stamped unless stamped as original instruments, or unless it appears by some stamp impressed thereon, that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart (*d*). Where the duty does not amount to five shillings, then the duty is the same as that on the original instrument, but in any other case the duty is five shillings on the duplicate or counterpart (*e*).

Time for Stamping.—Where the duty of sixpence upon an agreement for hire-purchase is denoted by a sixpenny adhesive stamp, it must be cancelled by the person by whom the agreement is first executed (*f*). Agreements under hand only and liable to the fixed duty of sixpence may be stamped without penalty within fourteen days from the date of execution (*g*). In the case of a “bond, covenant, or other instrument whatsoever” chargeable with an *ad valorem* duty, the instrument, unless it is written upon duly stamped material, must be stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed (*h*). The fourteen and thirty days are calculated exclusively of the date of execution.

Penalty for Stamping Instruments after Time allowed.—The Commissioners of Inland Revenue may, if they think fit at any time within three months after the first execution of any instrument, mitigate or remit any penalty payable on stamping (*i*). After three months the Commissioners have no power to remit or mitigate the penalty; an unstamped or insufficiently stamped instrument can then only be stamped on payment of the

(*d*) The Stamp Act, 1891, s. 72; 16 Halsbury's Statutes 638.

(*e*) *Ibid.*, Schedule I; 16 Halsbury's Statutes 656.

(*f*) *Ibid.*, s. 22; 16 Halsbury's Statutes 625.

(*g*) This is provided for by the regulations of the Commissioners of Inland Revenue.

(*h*) The Stamp Act, 1891, s. 15 (2); 16 Halsbury's Statutes 623.

(*i*) *Ibid.*, s. 15 (3) (*b*).

unpaid duty and a penalty of £10 (*j*). The payment of penalties is denoted on instruments by a particular stamp (*k*).

Unstamped Instruments in Evidence.—Unstamped or insufficiently stamped instruments cannot be given in evidence in any proceeding other than criminal except on payment there and then of the duty, the penalty of £10, and a further sum of £1 (*l*). It is for the judge to take notice of such defect in the document, and therefore he must look at it (*m*). A witness's memory may be refreshed by an unstamped document being shown to him (*n*). If an unstamped agreement has been lost, secondary evidence of it cannot be given (*o*), but the presumption is that it has been duly stamped, though this presumption may be rebutted by evidence (*p*). A new trial will not be granted by reason of the ruling of any judge that the stamp on any document is sufficient, or that the document does not require a stamp (*q*). There is no appeal from the judge's decision in this respect (*r*), nor from his admission of an unstamped document in evidence without requiring the penalty (*s*). Where the judge rules that a document is not admissible, then the court above may refuse to go into the question of the improper rejection, unless it appears by the judge's note that the document has been formally tendered in evidence (*t*). It is the duty of counsel after the expression of the judge's opinion formally to tender the document and require a note to be taken of the

(*j*) The Stamp Act, 1891, s. 15 (1).

(*k*) *Ibid.*, s. 15 (4).

(*l*) *Ibid.*, s. 14 (1) and (4).

(*m*) *Jardine v. Payne* (1831), 1 B. & Ad. 663, at p. 670 ; 6 Digest 510, 3257.

(*n*) *Birchall v. Bullough*, [1896] 1 Q.B. 325 ; 6 Digest 513, 3284.

(*o*) *Rankin v. Hamilton* (1850), 15 Q.B. 187.

(*p*) *Marine Investment Co. v. Haviside* (1872), L. R. 5 H. L. 624 ; 6 Digest 509, 3248.

(*q*) R. S. C., O. 39, r. 8.

(*r*) *Blewitt v. Tritton and Others*, [1892] 2 Q.B. 327, C. A. ; 6 Digest 512, 3279.

(*s*) *Lowe v. Dorling and Son* (1905), 74 L. J. K.B. 794 ; 22 Digest 275, 2614.

(*t*) *Campbell v. Loader* (1865), 34 L. J. Ex. 50 ; 22 Digest 53, 300.

tender (*u*). The judge ought not to admit in evidence a document which requires to be properly stamped and is not properly stamped ; it is not usual for counsel to take the objection, and the duty is imposed on the court (*v*). The objection cannot in any way be got rid of, even by the consent of the parties (*w*). An instrument is held to be duly stamped when it is stamped in accordance with the law in force when the instrument was first executed, no matter what the date of the instrument may be (*x*).

SECTION 4—LEGAL PRINCIPLES AFFECTING AGREEMENTS

(A) CAPACITY TO CONTRACT

The general principles of the Law of Contract apply to hiring and hire-purchase agreements as to any other contract, and the reader should therefore refer to the treatises specifically relating to contracts, for details as to capacity to contract, formation of the contract, and so forth, which it is no part of the purpose of this book to supply.

There are given below, however, a few notes upon subjects which experience has shown frequently arise in the course of the making of contracts for hire and hire-purchase.

Agency.—The relation of agency, which is continually arising in business transactions whether under that name or not, is necessarily very frequently created in relation to hiring and hire-purchase agreements and will also frequently arise in the future in connection with credit-sale agreements. It exists whenever one person, usually called “ the agent,” has authority, express or implied, to act on behalf of another, generally called “ the principal,” and consents so to act.

(*u*) *Campbell v. Loader* (1865), *per* Channell, B., at p. 51.

(*v*) *Bowker v. Williamson* (1889), 5 T. L. R. 382, *per* Lord Coleridge, L.C.J., at p. 383 ; 7 Digest 20, 92.

(*w*) *Ibid.*, *per* Hawkins, J., at p. 383.

(*x*) *Clarke v. Roche* (1877), 3 Q.B.D. 170 ; 39 Digest 255, 395.

A common case is that of the dealer who negotiates a hire-purchase agreement between the customer and a finance company. The agent is to be distinguished from a servant on the one hand and an independent contractor on the other, the former acting under the direct control of his master, and the latter independently, merely undertaking to produce a result. An agent as such is not a servant, but a servant is usually his master's agent for some purpose either expressly or by implication. Speaking generally, whatever a person has power to do himself he may do by an agent (*z*), and what he cannot do by himself he cannot do by an agent (*a*)

There are exceptions to the rule that whatever a person can do by himself he can do by an agent, but the only one it is proposed to deal with here is the following :—

Where the transaction is required by statute to be evidenced by the signature of the principal himself (*b*).

This exception becomes of importance under the provisions of the Hire-Purchase Act, 1938 (*c*). By section 2, subsection (2), of the Act it is provided that an owner shall not be entitled to enforce a hire-purchase agreement in relation to which the Act applies (and other rights) unless *inter alia* " a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement." A similar provision (*mutatis mutandis*) is enacted by section 3, subsection (2), in relation to credit-sale agreements. Although the word " personally " is not inserted after the word " hirer," it is submitted that on the true construction of the subsection, the signature of the hirer in person is necessary, whereas the other parties may sign by an agent.

(*z*) *Bevan v. Webb*, [1901] 2 Ch. 59, C.A. ; 1 Digest 272, 37.

(*a*) *Bateman v. Mid-Wales Rail Co.* (1866), L.R. 1 C.P. 499 ; 10 Digest 1170, 8307.

(*b*) *e.g.* Lord Tenterden's Act, s. 6 ; 3 Halsbury's Statutes 584 ; Moneylenders Act, 1927, s. 6 (1) ; 12 Halsbury's Statutes 230.

(*c*) Appendix A, *post*, p. 272.

The following classes of persons have only a limited capacity to contract or act as principals, *i.e.*, infants, persons of unsound mind, drunkards and corporations (*d*).

But an agent's competency to act or contract for his principal is not necessarily limited to his competency to act for himself, *e.g.*, a minor may be an agent and contract so as to bind his principal (*e*).

Agency may arise by estoppel where one person has acted in such a manner as to lead another person to believe that he has authorised a third person to act on his behalf, and that other person relying on the representation or "holding out" contracts with the third person in a matter within the scope of the ostensible authority (*f*). In such a case it is immaterial whether the ostensible agent had no authority in fact (*g*), or merely acted in excess of his actual authority (*h*). This legal principle is of great importance in relation to the creation of liens for repair on goods let on hire or hire-purchase (*i*).

Conversely, a person who is in fact acting as an agent may make himself personally liable on a contract by signing it in his own name without disclosing the name or the existence of his principal (*j*). Nor does he cease to be liable on the discovery by the other contracting party of the name of the principal, unless and until the other contracting party has unequivocally elected to look to the principal alone, and parol evidence of the agent's intention to act on behalf of his principal is inadmissible (*k*).

(*d*) These classes will be dealt with in more detail later.

(*e*) *Kirby v. Great Western Railway Co.* (1868), 18 L.T. 658; 1 Digest 278, 96; *Smally v. Smally* (1700), 1 Eq. Cas. Abr. 283; 28 Digest 143, 36.

(*f*) *Wood v. Clydesdale Bank, Ltd.*, [1914] S.C. 397; 3 Digest 192, 400 ii.

(*g*) *Pickard v. Sears* (1837), 6 Ad. & El. 469; 21 Digest 290, 1032.

(*h*) *Little v. Spreadbury*, [1910] 2 K.B. 658; 42 Digest 67, 593.

(*i*) *Keene v. Thomas*, [1905] 1 K.B. 136; 32 Digest 247, 321; *Green v. All Motors, Ltd.*, [1917] 1 K.B. 625; 32 Digest 248, 322; *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307; Digest Supp. and see *post*, pp. 221-226.

(*j*) *Saxon v. Blake* (1861), 29 Beav. 438; 1 Digest 627, 2520; *Higgins v. Senior* (1841), 8 M. & W. 834; 1 Digest 639, 2599.

(*k*) *Higgins v. Senior* (*supra*).

These matters are of importance in and about the making of hire-purchase agreements, which are all too frequently signed hurriedly either on one side or the other, without due care and formality. But the most important aspect that should be considered in connection with the doctrine of agency, is the giving of warranties or the making of representations by dealers in the course of negotiating with customers, transactions which will result in hiring or hire-purchase agreements between the customers and finance companies. It has been in the past common form for the finance companies to include in such agreements clauses excluding all possible warranties, and expressly stating that the hire-purchase agreement contains all the terms of the contract between the parties, and even in a few cases that the dealer is to be deemed to be the agent of the hirer. Legally, this has been effective, as a rule, in the past, to save the finance company from liability, though it is to be feared, at the cost of a generally increasing prejudice against hire-traders. The matter has now been dealt with by the Hire-Purchase Act, 1938. It is provided by section 5 (d) and (e) of the Act, as follows :—

“ 5. Any provision in any agreement—

(d) Whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase agreement or credit-sale agreement is treated as or deemed to be the agent of the hirer or the buyer, or

(e) Whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase agreement or credit-sale agreement, shall be void.”

It should be borne in mind that the Act only applies in relation to such hire-purchase agreements and credit-sale agreements as come within the categories laid down in section 1 of the Act (l).

(l) Appendix A, *post*, p. 273.

Credit-sales Agreements.—It is presumed that the law to apply to these agreements, unless otherwise specifically laid down in the Hire-Purchase Act, 1938, will be the law relating to Sale of Goods, and in particular the Sale of Goods Act, 1893.

Infants.—An infant is a person under 21 years of age. By the Common Law the contracts of an infant, except for necessities, were voidable at his option, either before or after attaining his majority, but if not avoided within a reasonable time after attaining his majority were deemed to be ratified (*m*). Now, certain contracts are, by the Infants Relief Act, 1874 (*n*), made not merely voidable, but absolutely void, and further no action may be brought upon any promise made after full age to pay a debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there is or is not any new consideration for such promise or ratification after full age (*n*). Included in the contracts made absolutely void are contracts “for goods supplied or to be supplied (other than contracts for necessities).” There appears to be no reported case to the effect that contracts for goods supplied or to be supplied on simple hiring or hire-purchase terms, are or are not within the scope of the section, but there would appear to be no reason either in grammar or good sense why they should not be within it. It has been decided that goods given in exchange for other goods are goods “supplied” within the section (*o*). Necessaries are defined by section 2 of the Sale of Goods Act, 1893 (*p*), as

“goods suitable to the condition of life of such infant (or minor) and to his actual requirements at the time of the sale and delivery.”

and though it will be observed that the definition is con-

(*m*) *Ryder v. Wombwell* (1868), L. R. 3 Ex. 90 ; 4 Ex. 32 ; 28 Digest 165, 216 ; *Peters v. Fleming* (1840), 6 M. & W. 42 ; 28 Digest 167, 236.

(*n*) S. 1. (2) ; 9 Halsbury's Statutes 785.

(*o*) *Pearce v. Brain*, [1929] 2 K. B. 310 ; Digest Supp.

(*p*) S. 2 ; 17 Halsbury's Statutes 612 ; *post*, p. 323.

fined to cases coming within the scope of the section, *viz.* sale and delivery of goods, and is therefore not in terms applicable to contracts for simple hire or for hire-purchase, unless the latter are also agreements for sale as in *Lee v. Butler* (q), yet it would appear to contain in it, *mutatis mutandis*, the elements of a sound definition of the word in relation to these contracts as well. Reference should, however, be made to the many decided cases, for assistance as to what is or is not a necessary in any particular instance (r).

It was decided in *Valentini v. Canali* (s) that "When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid" (t). On the principle of this case, an infant hirer is not entitled to recover from the owner of goods (not being necessities), let to the infant on a hiring or hire-purchase agreement, monies paid under the agreement, after the hirer has had substantial user of the goods.

Apart from those contracts specifically rendered completely void by section 1 of the Infants Relief Act, 1874 (u), and certain particular contracts dealt with by special statutes (v), the contracts of infants are governed in general by the Common Law, that is to say, they are voidable at the infant's option, and unless avoided are valid (w).

(q) [1893] 2 Q.B. 318 ; 3 Digest 92, 241.

(r) See among others *Clyde Cycle Co. v. Hargreaves* (1898), 14 T. L. R. 338 ; 28 Digest 171, 297 ; *Fawcett v. Smethurst* (1914), 84 L. J. K. B. 473 ; 28 Digest 179, 392 (Hiring of motor car).

(s) (1889), 24 Q.B.D. 166 ; 28 Digest 164, 207. In this case the plaintiff, an infant, agreed with the defendant to become tenant of a house and pay a certain sum for the furniture therein. The plaintiff used the house and furniture for several months and paid a part of the money. He sought a declaration that the contract was void, and claimed the return of the money he had paid. The contract was set aside, but it was held that he could not recover the money paid. See also *Hamilton v. Vaughan-Sherrin, etc., Co.*, [1894] 3 Ch. 589 ; 9 Digest 276, 1699 ; *Pearce v. Brain*, [1929] 2 K. B. 310 ; Digest Supp.

(t) *per* Lord Coleridge, C. J., at p. 167.

(u) 9 Halsbury's Statutes 784.

(v) *e.g.*, Infant Settlements Act, 1855 ; Building Societies Act, 1874.

(w) *Duncan v. Dixon* (1890), 44 Ch. D. 211 ; 28 Digest 156, 167 ; *Re Laxon & Co.* (2), [1892] 3 Ch. 555 ; 28 Digest 156, 162 ; *Whittingham v. Murdy* (1889), 60 L. T. 956 ; 28 Digest 156, 167.

It has been held that a contract by an infant for necessities and for his benefit is binding on him, and cannot be repudiated by him on the ground that it is in part executory (*x*), but where the necessities take the shape of goods sold, it would appear that the question is governed by section 2 of the Sale of Goods Act, 1893 (*y*), and an infant cannot be made liable to pay for goods, unless they have actually been delivered, and in consequence he cannot be made liable for refusing to accept goods, or for the price of goods bargained and sold but not delivered. If this distinction is correct, then an executory contract for the hire-purchase of necessities to an infant, under a *Helby v. Matthews* (*z*) agreement, would be enforceable against the infant, whereas an executory *Lee v. Butler* (*a*) agreement would not. The validity of a credit-sale agreement to which an infant is a party, will be determined in exactly the same way as any other agreement for the sale of goods.

Torts of Infants.—An infant is liable for a tort committed by him so long as it is not founded upon a contract upon which he cannot be sued. Thus, an infant who hired a mare for riding and injured her by over-riding was held not liable, although the action was framed in tort for damages for negligence (*b*), whereas an infant who hired a horse for riding only, and was expressly forbidden to jump it, was held liable in tort for the damages resulting (*c*). The wrongful act was held to be a bare trespass not within the object and purpose of the hiring.

An infant is accordingly liable in trover for wrongfully selling or disposing of hired goods, although he cannot be sued on the contract, if not for necessities (*d*). As was

(*x*) *Roberts v. Gray*, [1913] 1 K. B. 520 ; 28 Digest 157, 171.

(*y*) 17 Halsbury's Statutes 612 ; *post*, p. 323.

(*z*) [1895] A.C. 471 ; 3 Digest 93, 245.

(*a*) [1893] 2 Q. B. 318 ; 3 Digest 92, 241.

(*b*) *Jennings v. Rundall* (1799), 8 Term. Rep. 335 ; 28 Digest 178, 387.

(*c*) *Burnard v. Haggis* (1863), 32 L. J. C. P. 189 ; 28 Digest 179, 388 ;
See also *Walley v. Holt* (1876), 35 L.T. 631 ; 28 Digest 179, 389 ;
Fawcett v. Smethurst (1914), 84. L J. K. B. 473 ; 28 Digest 179, 392.

(*d*) *Bristow v. Eastman* (1794), 1 Esp. 172 ; 28 Digest 180, 403.

said by Wright, J., in *Burton v. Levey* (e), citing *Leake on Contracts* (1878 Ed., p. 546) with approval:—

“ An infant is not permitted to take advantage of inability
 “ to contract to effect a fraud, and upon avoidance of a
 “ contract he will be compelled upon equitable grounds,
 “ to make restitution of the benefits obtained under it.”

and he gave judgment in detinue against an infant who had wrongfully refused to deliver on demand certain rings which had been handed to the infant on terms which had not been fulfilled.

Where a hiring or hire-purchase agreement in respect of goods which are not necessities has been determined, and the infant hirer refuses to deliver them up on demand, although the owner is unable to sue on the contract, yet he can recover the goods in an action of detinue, as the gist of that action is the wrongful refusal to deliver on demand (f), and it would accordingly not be necessary to found the action on the breach of contract (g). An infant hirer who sells the hired goods can be convicted of larceny as a bailee (h). As to joint contracts of infant and adult reference should be made to *Gillow v. Lillie* (i), *Burgess v. Merrill* (j), *Wauthier v. Wilson* (k). The effect in short is that the adult remains liable though the infant be discharged.

Lunacy and Drunkenness.—In order to avoid a

(e) (1891), 7 T.L.R. 248; 28 Digest 180, 398; and see *Stocks v. Wilson*, [1913] 2 K.B. 235; 28 Digest 165, 273; but see *Leslie (R) Limited v. Sheill*, [1914] 3 K.B. 607; 28 Digest 177, 377; *Lemprière v. Lange* (1879), 12 Ch. D. 675; 28 Digest 197, 566.

(f) *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488.

(g) *Burton v. Levey* (1891), 7 T. L. R. 248; 28 Digest 180, 398. See also *Cowern v. Nield*, [1912] 2 K.B. 419; 28 Digest 173, 338; *Mills v. Graham* (1804), 1 B. & P.N.R. 140; 3 Digest 56, 78. But in the case of a hire-purchase agreement coming within the scope of the Hire-Purchase Act, 1938, in which the requirements of section 2 as to the note or memorandum, etc., have not been fulfilled, the owner will be unable to enforce “any right to recover the goods from the hirer,” unless the Court, where it has the power, has dispensed with the requirements.

(h) *R. v. McDonald* (1885), 15 Q. B. D. 323; 3 Digest 56, 22.

(i) (1835), 1 Bing. N.C. 695; 28 Digest 174, 357.

(j) (1812), 4 Taunt. 468; 28 Digest 174, 352.

(k) (1912), 28 T.L.R. 239; 28 Digest 174, 353.

contract on the ground of insanity, it must be shown not only that the defendant was insane at the time that the contract was entered into, but also that the other contracting party knew of his state of mind.

“ When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about ” (l).

A drunken person is in the same position as a lunatic from the point of view of capacity to contract.

Married Women.—Great changes in the legal position of married women in relation to property contracts and torts have been made in consequence of the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935.

For the purposes of this book it will be sufficient to make the following brief observations.

As regards property, a married woman is, for practical purposes, placed in the same position as an unmarried woman or a man (with certain exceptions relating to marriages which began before the 1st January, 1883, which need not here be considered), the institution of “ separate property ” being eliminated and “ restraint on anticipation ” being abolished. A married woman is now capable of acquiring, holding and disposing of property, and of rendering herself and being rendered liable in respect of any tort, contract, debt or obligation as though she were a *feme sole* (m).

The husband of a married woman is not, by reason only of being her husband, liable (a) in respect of any tort committed by her whether before or after the marriage

(l) *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599, at p. 601, *per* Lord Esher, M.R. ; 33 Digest 130, 57.

(m) Law Reform (Married Women & Tortfeasors) Act, 1935, s. 1 ; 28 Halsbury's Statutes 104.

or (b) in respect of any contract entered into or debt or obligation incurred by her before marriage, or to be sued or made a party to any legal proceedings brought in respect of such tort, contract, debt or obligation (*n*). The position, however, of the husband in relation to liability or exemption from liability in respect of a wife's post-nuptial contracts is not affected (*o*). A wife has no authority, by reason only of the marriage, to contract on behalf of her husband, but the husband will be bound if the contract was made with his authority express or implied (*p*), or he may be estopped from denying the authority by reason of his conduct (*q*), or he may subsequently ratify it (*r*). Further, if husband and wife are living together, the wife is presumed to have authority to pledge her husband's credit for necessaries (*s*).

(B) CORPORATIONS

A corporation normally has the same powers of contracting as a natural person, but this is subject to certain limitations. For instance, a company formed solely for a definite and particular purpose, cannot contract with relation to matters outside the scope of that particular purpose. Readers are referred to treatises on Company Law (*t*).

As to the method of entering into a contract by a corporation or limited company, see *ante*, pages 7 and 8. The word "person" *prima facie* includes a corporation, not only in Statutes but in documents (*u*).

(*n*) Law Reform (Married Women & Tortfeasors) Act, 1935, s. 3; 28 Halsbury's Statutes 106.

(*o*) *Ibid.*, s. 4 (2) (a) & (b); 28 Halsbury's Statutes 106.

(*p*) *Debenham v. Mellon* (1880), 6 App. Cas. 24; 27 Digest 191, 1587.

(*q*) *Filmer v. Lynn* (1835), 4 Nev. & M. K.B. 559; 27 Digest 188, 1542.

(*r*) *Millard v. Harvey* (1864), 34 Beav. 237; 27 Digest 190, 1568.

(*s*) *Jolly v. Rees* (1864), 15 C.B. N.S. 628; 27 Digest 193, 1614.

(*t*) See also *Ashbury Railway, etc., Co. v. Riche* (1875), L. R. 7 H. L. 653; 9 Digest 33, 6; *L.C.C. v. Attorney-General*, [1902] A.C. 165; 13 Digest 366, 994; *Copper Miners' Co. v. Fox* (1851), 16 Q. B. 229; 13 Digest 390, 1159.

(*u*) *Wilmott v. London Road Car Co., Limited*, [1910] 2 Ch. 525; 13 Digest 353, 911.

(C) ILLEGALITY, IMMORALITY AND FRAUD

It is not proposed to enter here into any detailed discussion on the topics in this sub-heading, as they are not found to arise with any particular frequency or significance in relation to the contracts of hire or hire-purchase, and reference should be made to the usual textbooks.

It should be borne in mind, however, by owners particularly, that their servants and agents acting within the scope of their authority may render them liable in an action of deceit (*v*), and that fraud may consist in a statement made recklessly and without care as to its truth or falsity, just as much as in a deliberate mis-statement of the truth (*w*). Further, the intent to deceive does not necessarily involve an intention to injure or cheat. It is sufficient if a false statement is made with the intent that it should be acted on, and it induced the contract (*x*).

If the owner of goods, innocent in themselves, enters into a hiring or hire-purchase agreement with regard to them, knowing that they are intended for an illegal or immoral purpose, he cannot maintain an action upon the contract, for no man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them (*y*). Where goods are let or sold to a prostitute, and the owner knows that the hirer or purchaser is a prostitute, and the goods supplied are not merely such as would be necessary or useful for ordinary purposes and might also be applied to an immoral one, but are such as would under the circumstances not be required except with the view of an immoral occupation, then the price of the hire or the purchase cannot be

(*v*) *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716 ; 1 Digest 596, 2292.

(*w*) *Derry v. Peek* (1889), 14 App. Cas. 337, *per* Lord Bramwell, at p. 447 ; 35 Digest 27, 185.

(*x*) *United Motor Finance Co. v. Addison & Co., Ltd.*, [1937] 1 All E.R. 425 ; Digest Supp.

(*y*) *Lightfoot v. Tenant* (1796), 1 B. & P. 551, *per* Eyre, C.J., at p. 556 ; 11 Digest 403, 733.

recovered (z). It is not necessary that the plaintiff should expect to be paid out of the proceeds of the immorality (a). If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiff's knowledge of it, and that the goods were required and furnished to facilitate that object, it is sufficient to defeat the plaintiff's claim (b). But mere knowledge that the defendant is a prostitute will not prevent a plaintiff recovering the price of goods hired or sold (c).

SECTION 5—CONSTRUCTION OF AGREEMENTS

(A) HIRE OR SALE

Agreement for Sale or Option.—One of the most important questions in the construction of a hire-purchase contract is, whether the agreement between the parties is an agreement for hire with an option in the hirer to buy (d) or an agreement for sale (e). This matter is dealt with at length in Chapter 6, *post*.

Briefly, the question is—what is the dominant relationship between the parties—that of letter and hirer, or seller

(z) *Pearce v. Brooks* (1866), L. R. 1 Ex. 213; 3 Digest 86, 201. In this case the defendant, a prostitute, was sued by the plaintiffs, coach builders who knew her calling, for the hire of a brougham. There was no evidence that the plaintiffs looked to the proceeds of the defendant's occupation for payment; but the jury found that the plaintiffs supplied the brougham with the knowledge that it would be used by the defendant as part of her display.

(a) *Ibid.* In the case of *Bowry v. Bennett* (1808), 1 Camp. 348; 12 Digest 275, 2256, where a prostitute was sued for the value of clothes and pleaded that the plaintiff knew what she was and knew that the clothes were required for her calling, Lord Ellenborough would seem to have laid it down that it must be shown that the plaintiff expected to be paid from the defendant's earnings as a prostitute, but Baron Bramwell, in *Pearce v. Brooks* (*supra*), at pp. 215 and 221, said that Lord Ellenborough appeared to have referred to the intention as to payment not as a legal test but as a matter of evidence with reference to the particular circumstances of the case.

(b) *Pearce v. Brooks* (1866), L. R. 1 Ex. 213, *per* Pollock, C.B., at p. 218; 12 Digest 264, 2156.

(c) *Lloyd v. Johnson* (1798), 1 B. & P. 340; 12 Digest 277, 2270.

(d) *Helby v. Matthews*, [1895] A. C. 471; 3 Digest 93, 245.

(e) *Lee v. Butler*, [1893] 2 Q. B. 318; 3 Digest 92, 241.

and purchaser? Upon the answer to this question depends the solution of many difficulties which arise in connection with hire-purchase agreements, owing to the statutory privileges attaching to one who has bought or agreed to buy goods, and is with the consent of the seller in possession of the goods (f). Where a person, although described throughout the contract as the hirer, agrees to pay for certain chattels a certain sum on one day, and a further sum on a fixed day later, such an agreement is an agreement for purchase (g).

On the other hand, where there is no legal obligation on the part of the hirer to buy, but only an option to buy, which may be exercised on the happening of a certain event (e.g. the payment of rent for a certain period, or the payment of a certain sum after the payment of rent for a certain period, or the payment of rent which amounts to a certain sum), and the hirer has power to return the goods hired at any time, then such an agreement is an agreement to hire and not one in which the hirer has "agreed to buy" (h).

It has recently been held in the Court of Appeal, though possibly the decision should be regarded as *obiter*, as it was not strictly necessary for the decision of the case, in the case of *Felston Tile Co. v. Winget* (i) that a hire-purchase agreement substantially in the form in *Helby v. Matthews* (h), i.e. in which there was no obligation on the hirer to buy, was an irrevocable "agreement to sell" on the part of the owner within the Sale of Goods Act, 1893, section 1 (j), and that therefore the statutory warranties and conditions should be implied. It is submitted, however, that an agreement to sell connotes an agreement to buy, and since, *ex hypothesi*, there was no agreement by the hirer to buy, the agreement could not strictly

(f) See the Factors Act, 1889 ; Sale of Goods Act, 1893.

(g) *Lee v. Butler*, *supra*. This case is dealt with in detail on p. 157, *post*.

(h) *Helby v. Matthews*, *supra*. For details of the facts and arguments in this case, see *post*, p. 158.

(i) [1936] 3 All E.R. 473 ; Digest Supp.

(j) 17 Halsbury's Statutes 612.

be more than a binding offer to sell. The bearing of this case on the case of *Helby v. Matthews* is discussed in Chapter 6, *post*, p. 159.

(B) APPLICATION OF BILLS OF SALE ACTS

Another important question which arises for consideration on the construction of hire-purchase agreements, is whether or not the document amounts to a bill of sale. On the decision of this question frequently depends the ownership of property to the value of many thousands of pounds, as owing to the severity of the provisions of the Bills of Sale Acts, 1878 and 1882, lack of registration (even if, owing to the form of the document, registration were not impossible) may render the entire transaction nugatory.

The purpose of the Bills of Sale Acts was twofold.

The Act of 1878, whereby the Acts of 1854 and 1866 (which do not here concern us) were repealed, was passed to protect creditors by preventing false credit being given to persons who had parted with the ownership of goods, on the strength of their continuing in possession of those goods as though they were the owners. The Act of 1882 was passed for the very different purpose of protecting needy persons being entrapped into signing complicated documents which they might be unable to understand, and so be subjected to harsh provisions (*k*).

A bill of sale has been defined by Lord Esher in *Johnson v. Diprose* (*l*) as "a document given with respect to the transfer of chattels and is used in cases where possession is not intended to be given." There are two main classes of bills of sales, absolute bills of sale and those given by way of security for the payment of money, and the Act of

(*k*) *Manchester, Sheffield & Lincolnshire Railway Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554, *per* Lord Herschell, L.C. at p. 560; 7 Digest 4, 6.

(*l*) (1893) 1 Q. B. 512; 7 Digest 132, 754.

1882, usually called the Amending Act, deals solely with the latter class, and it is in relation to the latter class that questions as a rule arise in connection with hire-purchase agreements. By section 4 of the Act of 1878 (*m*)—the principal Act—(which by section 3 is made to apply to bills of sale (whether absolute or subject or not to any trust) whereby the grantee has power to seize or take possession of any personal chattel comprised in such bills of sale) it is enacted that the expression “bill of sale” (which has the same meaning in both acts, except that the Amending Act does not apply to documents given otherwise than by way of security for the payment of money) shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereof attached, or receipts for purchase-moneys of goods, and other *assurances of personal chattels*, and also powers of attorney, authorities, or *licences to take possession of personal chattels as security for any debt*, and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred (*n*). The words in the above definition which are printed in italics will be found to be those in connection with which controversy frequently arises in connection with hire-purchase agreements. The expression “personal chattels” means goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but not fixtures when assigned together with a freehold or leasehold interest in any land or building to which they are affixed (unless they be trade machinery which is always to be deemed to be personal chattels) nor growing crops when assigned together with any interest in the land on which they grow. Further, the term “personal chattels” does not include chattel

(*m*) 2 Halsbury's Statutes 85.

(*n*) Bills of Sale Act, 1878, s. 4 ; 2 Halsbury's Statutes 85.

interests in real estate, stocks and shares, choses in action, or stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale (*o*).

It is obvious that it is not every document drawn up at the time of the transaction transferring goods from one to another that is a bill of sale. A large number are expressly excepted by the same section of the Act, *e.g.*, "assignments for the benefit of creditors of the grantor, marriage settlements, transfers and assignments of ships, transfers of goods in the ordinary course of business, bills of sales of goods in foreign parts, or at sea, bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented." Further, transactions which are intended to effect the immediate transfer of actual possession of the goods to the grantee are not within the Acts (*p*), *e.g.*, sale and actual delivery of goods accompanied by a document that is within the definition.

Documents only and not transactions are affected, and the Acts do not affect rights or titles which can be established without reference to the documents (*q*), nor do they require that any transactions should be reduced into writing, but merely that if they are so reduced they must be registered, if they are of the character aimed at by the Acts, and if they are of the character affected by the Amending Act, they must be reduced into a specific

(*o*) Bills of Sale Act, 1878, ss. 4 & 5; 2 Halsbury's Statutes 85, 89.

(*p*) *Charlesworth v. Mills*, [1892] A. C. 231; 7 Digest 4, 7.

(*q*) *Manchester, etc., Railway Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; 7 Digest 4, 6; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; 7 Digest 11, 44.

form, or certain consequences follow (*r*). These consequences are not the same under both Acts.

Under section 8 of the 1878 (*s*) Act, every bill of sale to which the Act applies must be attested and registered under the Act within seven days from the making of it and must set forth the consideration for which it was given, otherwise it is to be deemed to be fraudulent and void as against three distinct classes of persons, *viz.*, (1) trustees of the grantor's estate in bankruptcy or under any assignment for the benefit of creditors; (2) sheriffs and other persons seizing any of the chattels comprised in such a bill of sale under any process of execution; and (3) the execution creditors on whose behalf such process is levied—so far as regards the property in or the right to the possession of any chattels comprised in such bill of sale, which after the seven days and at or after the petition in bankruptcy, assignment or execution, are in the grantor's possession or apparent possession.

This section does not apply to bills of sale given by way of security for money, as it has been replaced by section 8 of the Act of 1882 (*t*), which while requiring practically the same formalities as to attestation and registration, enacts that failure to comply with them shall render the bill of sale absolutely void in respect of the chattels comprised in it—not merely void as against certain classes of person. In addition the Amending Act provides that a bill of sale to which it applies must be in the form in the Schedule to the Act (section 9) (*u*) and must not be made or given in consideration of any sum under £30 (*v*), otherwise it shall be absolutely void. Further, under the Amending Act, there are circumstances laid down under which the

(*r*) *United Forty Pound Loan Club v. Bexton*, [1891] 1 Q. B. 28, n.; 7 Digest 17, 73.

(*s*) 2 Halsbury's Statutes 91.

(*t*) 2 Halsbury's Statutes 103.

(*u*) 2 Halsbury's Statutes 104, 107. See also *Davies v. Rees* (1886), 17 Q. B. D. 408; 7 Digest 53, 282; *Smith v. Whiteman*, [1909] 2 K.B. 437; 7 Digest 78, 444.

(*v*) S. 12; 2 Halsbury's Statutes 105.

bill of sale shall be void *except as against the grantor, viz.*, in respect of chattels not specifically described in the Schedule to the bill of sale (such Schedule being necessary under the Act (*w*)) and in respect of personal chattels specifically described in this Schedule of which the grantor was not the true owner at the time of its execution (*x*). This exception of avoidance in the last two cases is an important matter in cases of bankruptcy and in executions, and it is suggested *obiter* by Roche J. in *British Railway Traffic and Electric Company Limited v. West Limited*, (*y*) that the effect of avoidance under section 9, may be wider than under section 8, the former making use of the word "void" and the latter of the words "void in respect of the personal chattels comprised therein" (*z*). It has been decided that, although a bill of sale when void under section 9 is void for all purposes, including the covenant to repay, yet the liability to repay is not gone completely, as an action would lie for money had and received, quite apart from the bill of sale (*a*).

It is not within the scope of this book to consider in detail the various types of documents included in the statutory description, and the reader is referred to the various treatises on the subject. The point to be considered here is,—when is a document in the form of a hire-purchase agreement or a number of documents including a hire-purchase agreement, a bill of sale?

A *bona fide* hire-purchase agreement is not a bill of sale, and does not require registration as a bill of sale (*b*), because

(*w*) S. 4 ; 2 Halsbury's Statutes 100.

(*x*) S. 5 ; 2 Halsbury's Statutes 101.

(*y*) Jones and Proudfoot's *Notes on Hire-Purchase Law*, p. 51.

(*z*) Bills of Sale Act (1878) Amendment Act, 1882, ss. 8 & 9 ; 2 Halsbury's Statutes 103, 104.

(*a*) *Bradford Advance Co., Ltd. v. Ayres*, [1924] W. N. 152 ; Digest Supp.

(*b*) *Ex parte Crawcour, In re Robertson* (1878), 9 Ch. D. 419 ; 7 Digest 15, 67 ; *Ex parte Emerson, Re Hawkins* (1871), 41 L. J. Bcy. 20 ; 7 Digest 21, 95 ; *Crawcour v. Salter* (1881), 18 Ch. D. 30 ; 7 Digest 16, 69 ; *Horsley v. Style* (1893), 69 L.T. 222, C.A. ; 7 Digest 83, 478.

no property passes, nor is it intended that it shall pass, to the hirer until all the instalments have been paid and the option to purchase has been exercised. Even where the agreement is an agreement to buy commonly called a *Lee v. Butler* agreement—the property is not intended to pass, nor is there any transfer of the property until all the instalments have been paid (c). On the other hand possession is given and is intended to be given to the person who may ultimately become the owner, *i.e.*, the hirer, and, therefore, in one sense, a *bona fide* hire-purchase agreement is the antithesis of a bill of sale.

Neither the giving nor the discounting of promissory notes or bills of exchange given as collateral security for the payment of the total amount of the instalments converts a hire-purchase agreement into a bill of sale (d).

The right to retake possession which the owner reserves to himself in hire-purchase agreements (e) is not a licence given him to take possession of chattels as security for a debt within the meaning of the Bills of Sale Acts (f). As was said by Fry, J. :—

“ The words ‘ licence to take possession of personal
“ chattels as security for any debt ’ mean a licence by the
“ owner of the property to the person who advances
“ money to take possession of the chattels which remain
“ in the custody of the owner. That is not the nature
“ of this transaction because the only licence which is to
“ be found in the instrument is a licence to the person
“ who is described as the owner to take possession of his
“ own chattels ” (g).

(c) *McEntire v. Crossley*, [1895] A. C. 457, *per* Lord Shand, at p. 470 ; 7 Digest 16, 70.

(d) *Modern Light Cars, Ltd. v. Seals*, [1934] 1 K.B. 32 ; Digest Supp. ; *Re Rankin & Shilliday*, [1927] N.I. 162, C.A. ; Digest Supp. ; *Continental Guaranty Corporation, Ltd. v. Mercado* (unreported) ; *Cooper v. Oswald Tillotson, Ltd.* (unreported) ; *Chown v. B. S. Marshall* (1925), *The Times*, Dec. 19th, 1935.

(e) See p. 79, *post*.

(f) *Ex parte Crawcour, In re Robertson* (*supra*), *per* Jessel, M.R., at p. 423.

(g) *United Forty Pound Loan Club v. Bexton*, [1891] 1 Q. B. 28 ; 7 Digest 17, 73.

Where there is a *bona fide* sale of furniture anterior to and independent of a real and *bona fide* hire-purchase agreement, the sale being by the person who is afterwards the hirer, the document is not a bill of sale (*h*). The practical difficulty that arises in such cases, owing to the circumstances which are usually present when such transactions are negotiated, is to induce the Court to hold that the sale and subsequent hiring are *bona fide* and express the real intentions of the parties. It will be found in practice that the alleged purchaser and subsequent letter-out on hire is generally a finance company, whose business consists in financing hire-purchase agreements,—a company which never handles the goods or has any organisation for that purpose, or a moneylender who is in the same position,—and the alleged hirer is in a low financial condition, and in consequence the transaction is not easily distinguishable from a loan on the security of the alleged hire-purchase agreement. In fact, in very many cases, the hire-purchase agreement is really only a colourable device intended to conceal an actual loan on the security of the power to take possession of the goods included in the hire-purchase agreement. If in truth the hire-purchase agreement is not *bona fide* and is being used as a cloak to cover the real transaction of loan, then it is a bill of sale and void unless the statutory requirements have been carried

(*h*) *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21 Ch. D. 309; 26 Digest 17, 54; *Stammers v. Margrett* (1905), 21 T. L. R. 342; 7 Digest 9, 33; *Manchester, Sheffield and Lincolnshire Railway Co. v. North Central Wagon Co.* (1888), 13 App. Cas. 554; 7 Digest 4, 6; *Redhead v. Westwood* (1888), 59 L. T. 293; 7 Digest 17, 72; *Re Yarrow, Collins v. Weymouth* (1889), 61 L. T. 642; 7 Digest 11, 48. See also *In re Watson, Ex parte Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27, *per Lord Esher, M. R.*, at p. 37; 7 Digest 17, 74; *British Railway Traffic & Electric Co. v. Kahn*, [1921] W. N. 52; Digest Supp.; *Victoria Dairy Co. v. West* (1895), 11 T. L. R. 233; 7 Digest 10, 38; *Clapham v. Ives* (1904), 91 L. T. 69; 7 Digest 10, 39; *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K. B. 305; Digest Supp.; see also the cases reported at p. 23 *et seq.* and p. 37 *et seq.*, of Jones and Proudfoot's *Notes on Hire-Purchase Law*. Some of these are not elsewhere reported.

out (*i*), which practically amounts to saying is invariably void, because in the first place, the main object of carrying out the loan by way of this device is to avoid registration, and in the second, a bill of sale in this form cannot be made to comply with the form in the schedule of the 1882 Act, as required by section 9 (*j*).

The true nature, not the form, of the transaction will be regarded by the Court (*k*). It does not follow that because people put the transaction into the form of a hire-purchase agreement when in truth there is no hiring, and the transaction is merely one of loan with security, the Court cannot hold that the document is a bill of sale, though called a hire-purchase agreement (*l*). If the documents do not really describe what the parties to it are doing, the Court will go through the documents in order to arrive at the truth, and when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham hire-purchase agreement (*m*). The Court has power to go behind the document and ascertain the true nature of the transaction (*n*). It is worth while setting out here the facts of one such case—*re Watson* (*o*)—to show

(*i*) *Maas v. Pepper*, [1905] A. C. 102; 7 Digest 6, 15. See also *Ex parte Odell*, *In re Walden* (1878), 10 Ch. D. 76; 7 Digest 8, 26; *French v. Bombernard* (1888), 60 L. T. 48; 7 Digest 11, 47; *Beckett v. Tower Assets Company*, [1891] 1 Q. B. 638; 7 Digest 17, 76; *Hooper v. Ker* (1884), 76 L. T. Jo. 307; 7 Digest 18, 77; *Brown v. Blaine* (1884), 1 T. L. R. 158; 7 Digest 16, 71; *Madell v. Thomas & Co.* [1891], 1 Q. B. 230; 7 Digest 17, 75; *In re Watson*, *Ex parte Official Receiver in Bankruptcy* (*infra*); *Johnson v. Rees* (1915), 84 L. J. K. B. 1276; 7 Digest 18, 80.

(*j*) *Re Townsend*, *Ex parte Parsons* (1886), 16 Q. B. D. 532; 7 Digest 51, 268.

(*k*) *In re Watson*, *Ex parte Official Receiver in Bankruptcy* (1890), 25 Q. B. D. 27; 7 Digest 6, 14.

(*l*) *Ibid.*, per Lord Esher, M. R., at p. 34.

(*m*) *Ibid.*, per Lord Esher, M. R., at p. 37.

(*n*) *Madell v. Thomas & Co.*, [1891] 1 Q. B. 230; 7 Digest 17, 75. See also *Wheatley's Trustee v. H. Wheatley, Limited* (1901), 85 L. T. 491; 7 Digest 18, 78.

(*o*) *Re Watson*, *Ex parte Official Receiver in Bankruptcy* (1890), *supra*.

how difficult it is to get round the Bills of Sale Acts by setting up a colourable story to cloak the real transaction.

“ An execution having been put into the house of a Mrs. Watson, she, through the agency of a friend got in touch with a Mr. Love for the purpose of raising money on her furniture which was worth about £300. Love agreed to advance £150. The following day Love came to her house with a hire-purchase agreement, the purport of which was that Love as owner let to Mrs. Watson as hirer the furniture on terms that she was to pay £40 per quarter until £200 was paid, when the furniture was to become her property. There was a proviso that in case the hirer did not duly fulfil the terms of the agreement, the owner might terminate the hiring and take possession of the goods, and for that purpose might enter upon the hirer's premises. Mrs. Watson was told that she must understand she was selling the furniture to Love, but that if she paid the instalments properly she would again become the owner of the furniture. Thereupon she was told by her friend to hand a chair to Love with words to the effect that she sold him the furniture and she did so. Love placed £150 less expenses on the table, and Mrs. Watson then signed the hire-purchase agreement. The County Court judge found on those facts that though it was the intention of Love that the transaction should take the form of a sale followed by a hire-purchase agreement, Mrs. Watson did not intend to part with all her interest in the furniture, but thought she was obtaining an advance on the security of the furniture. It was held by the Court of Appeal that the true nature not the form only, of the transaction must be looked to, and that this was a bill of sale and, therefore, void for want of registration.”

Even the hirer is entitled in such a case to take advantage of the invalidity and to recover back his goods if seized under powers contained in the alleged hire-purchase agreement (p), and a guarantor of such a fictitious

(p) *Madell v. Thomas, supra.*

hire-purchase agreement is discharged (q), but it would appear that guarantors of a hire-purchase agreement entered into by a company *ultra vires*, but in the belief that it is *intra vires*, and *bona fide*, and not to cloak a transaction that is in fact a bill of sale, are liable on their guarantees (r).

Further, if the lender comes within the definition of moneylender provided by section 6 of the Moneylenders Act, 1900 (s), the transaction is illegal and void, unless he is duly authorised to carry on the business of money-lending in accordance with the provisions of the Moneylenders Act, 1927 (t).

Assignment by Owner : when a Bill of Sale.—It is necessary to distinguish with some care between the assignment of the owners' rights under a hire-purchase agreement and the assignment of the goods comprised in the hire-purchase agreement, that is to say, to distinguish

(q) *Brown v. Blaine* (1884), 1 T.L.R. 158 ; 7 Digest 16, 71 ; *Chapleo v. Brunswick Permanent Building Society* (1881), 6 Q. B. D. 696 ; 26 Digest 97, 671. But see *Yorkshire Railway Wagon Company v. Maclure* (1882), 19 Ch. Div. 478, 490 ; 26 Digest 17, 54, overruled on appeal but on a different point, and the doubt expressed by Roche, J., in *British Railway Traffic and Electric Co., Limited v. H. A. West & Co., Limited, and Others*. This case is unreported except in *Notes on Hire-Purchase Law* : Jones and Proudfoot : at pp. 25 and 49. See also *In re German Mining Co.* (1854), 4 De G. M. & G., 19, 43 ; 9 Digest 472, 3094, and *Chambers v. Manchester & Milford Railway Co.* (1864), 5 B. and S. 588, 612 ; 26 Digest 124, 885, and the recent case of *Garrard v. James*, [1925] 1 Ch. 616 ; Digest Supp. In the last named case, Lawrence, J., applying the decision of Kay, J., in *Yorkshire Railway Wagon Co. v. Maclure* (1882), *supra*, decided that directors of a company who had guaranteed the repayment of an advance to the company, made under an agreement which was *ultra vires*, the company and unenforceable, were not thereby discharged but were liable under their guarantees, the *ratio decidendi* being apparently that the act of the company was not a *malum in se* and illegal, but merely *ultra vires* and distinguishable from the acts of the companies in *Swan v. Bank of Scotland* (1835), 10 Bli. N.S. 627 ; 3 Digest 169, 275, and *Macgregor v. Dover & Deal Railway Co.* (1852), 18 Q. B. 618 ; 10 Digest 1169, 8302, which had in each case been illegal and null and void. The report in *Brown v. Blaine*, *supra*, is not very conclusive, as it does not appear what, if any, authorities were cited to the Court.

(r) *Garrard v. James*, [1925] 1 Ch. 616 ; Digest Supp. (not a case of hire-purchase).

(s) 12 Halsbury's Statutes 222.

(t) *Whiteman v. Sadler*, [1910] A.C. 514, 521 ; 35 Digest 204, 294.

between a transfer of contractual rights in the agreement from a transfer of the owner's property rights in the chattels. It has been held that if an owner assigns his rights under a hire-purchase agreement by some document, it is merely an assignment of a benefit of a contract—of a chose in action—and does not require registration as a bill of sale (u). If, however, he assigns the goods themselves as security for a loan, then if the transfer is contained in a document it is a bill of sale (v) and must comply with the statutory requirements in order to be valid (w). And if by the same agreement the owner separately assigns by way of security for a loan, the goods and also the benefit of the hire-purchase agreement relating to them, the assignment of the goods is severable from that of the agreement, and the agreement is not void *in toto* for want of compliance with the statutory requirements of the Bills of Sale Acts but only so far as relates to the goods—the personal chattels (x). The question of assignment is dealt with at length in Chapter 3.

It is submitted, however, that if the owner of goods which are comprised in a hiring or hire-purchase agreement the terms of which are being duly observed by the hirer, assigns the property in the goods not by way of security only, but absolutely by deed or in writing, then the assignment cannot be invalidated by the 1878 Act. This Act only invalidates unregistered bills of sale so far as regards the property in or the rights to possession of the chattels which at the date mentioned are in the possession or apparent possession of the person making the bill of sale.

(u) *In re Davis & Co., Ex parte Rawlings* (1888), 22 Q. B. D. 193; 7 Digest 32, 167; *In re Isaacson, Ex parte Mason*, [1895] 1 Q. B. 333; 7 Digest 33, 168, and see, *re Thynne, Thynne v. Grey*, [1911] 1 Ch. 282; 7 Digest 33, 170. As to the assignment by an owner of his rights generally, see p. 108.

(v) *Jarvis v. Jarvis*, (1893), 63 L. J. Ch. 10; 7 Digest 29, 146.

(w) For further notes on the subject of assignment, see Chapter 3.

(x) *In re Isaacson, Ex parte Mason, supra*; *Cochrane v. Entwistle* (1890), 25 Q. B. D. 116; 7 Digest 56, 299.

By the hire-purchase agreement the legal and actual possession of the chattels has been given to the hirer—it is true only conditionally, but we have assumed that he has observed those conditions. So long as those conditions are observed, the owner cannot recover the goods or sue in detinue (y), and it is submitted that the owner cannot even be said to have constructive possession. Can the chattels be said to be in the apparent possession of the owner according to the definition of apparent possession given by section 4 of the Act? That definition is as follows:—"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken or given to any other person."

The answer to this problem must be sought by the examination of a number of cases where the question of a bailor's constructive or apparent possession of goods in the actual physical possession of a bailee has been considered.

In *Ancona v. Rogers* (z), a certain Mrs. Hewitt had assigned to the plaintiff certain furniture under a bill of sale (made to secure certain advances) under the terms of which she was to be allowed to remain in possession unless she made default in the terms of it. The bill of sale was not registered. The lady made default and then placed the goods in certain rooms on the premises of a Mr. Horlock, part of whose house she was about to occupy, where they were locked up and her agent kept the key. The plaintiff vainly endeavoured to get possession of them by demanding them of Mr. Horlock, and afterwards Mrs.

(y) *Gordon v. Harper* (1796), 7 Term R. 9; 43 Digest 496, 354; *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488; *Jelks v. Hayward*, [1905] 2 K. B. 460; 43 Digest 475, 137.

(z) (1876), 1 Ex. D. 285; 7 Digest 113, 666.

Hewitt presented her own petition in bankruptcy. It was decided by the Court of Appeal on those facts, that what took place at Mr. Horlock's house amounted to delivery of possession of the rooms to Mrs. Hewitt for the purpose of keeping her goods in them, and that Mr. Horlock was not a bailee of the goods, but that Mrs. Hewitt herself was in possession of them. The fact that the grantee under the bill of sale was entitled to, and demanded, possession, did not take the goods out of the grantor's possession within the meaning of 17 & 18 Vict. cap. 36, (which contains the same definition of apparent possession as the 1878 Act) and that the trustee in the liquidation was entitled to the goods as against the grantee. The Court went on, however, to hold (although it was not necessary for the decision) that even if Mrs. Hewitt had bailed the goods to Mr. Horlock to hold for her, she would still have been in possession within the Act. Mellish, L.J., in delivering the judgment of the Court, used these words (a) :—

“ It seems to us that goods which have been delivered
“ to a bailee to keep for the bailor, such as a gentleman's
“ plate delivered to his banker, or his furniture ware-
“ housed at the pantehnicon would, in a popular sense,
“ as well as in a legal sense, be said to be still in his
“ possession, and we see no valid ground for holding that
“ they are not still in his possession within the meaning
“ of the Bills of Sale Act. As long as the person who has
“ parted with goods by a secret bill of sale is having the
“ goods kept for him and is exercising dominion over
“ them, the case seems within the mischief against which
“ the Act is directed.”

The key to the position appears to be whether or not the grantor is still able to exercise dominion or control over the goods. In a hire-purchase agreement which is being observed, the owner has no such dominion or control, and in *Lincoln Waggon & Engine Company v. Mumford* (b), it

(a) At p. 292.

(b) (1879), 41 L. T. 655 ; 7 Digest 117, 682.

was held that a chattel pledged, was not in the apparent possession of the pledgor, for that reason. Stephen, J., said (c) :—

“ If one person deposits a chattel with another and
 “ borrows money upon that chattel, it cannot be said that
 “ it is in the possession or apparent possession of the
 “ person creating such a charge upon it. This would be
 “ opposed both to principle and authority ; to principle
 “ because the notion of possession implies this at least ;
 “ that the person while he has the goods in his possession
 “ or apparent possession has the power to dispose of them
 “ and act as owner towards them. It was also argued on
 “ the part of the defendant that because the goods were
 “ used and enjoyed by Procter ” (the pledgor) “ they
 “ were goods in his possession within the meaning of the
 “ statute, but he failed to show how a thing can be ‘ used
 “ and enjoyed ’ by one person when entirely under the
 “ control of another who has a charge upon it.”

Other cases that should be referred to on the construction of this section are *Robinson v. Briggs* (d), and *Ex parte Morrison, re Westray* (e).

If, however, the owner absolutely assigns the property in goods comprised in a hire-purchase agreement which is not being observed by the hirer, *i.e.*, where the owner is entitled to resume possession, the position it is submitted would be different, and the owner might then be said to be in the constructive possession of the goods in accordance with the decision in *Ancona v. Rogers* (f).

Bills of Sale and Companies.—By section 17 of the Bills of Sale Act (1878) Amendment Act, 1882 (g), it is provided that “ nothing in this Act shall apply to any debentures issued by any mortgage, loan or other incorporated company and secured upon the capital stock or goods, chattels and effects of such company.”

(c) At p. 658.

(d) (1870), L. R. 6 Ex. 1 ; 7 Digest 113, 665.

(e) (1880), 42 L. T. 158 ; 7 Digest 118, 683.

(f) (1876), 1 Ex. D. 285 ; 7 Digest 113, 666.

(g) 2 Halsbury's Statutes 106.

The words "other incorporated company" are not to be construed as limited to companies *ejusdem generis* with mortgage or loan companies, but any incorporated company which is authorised to raise money on loan or mortgage, comes within the section (*h*).

Mortgages and charges of any incorporated company for the registration of which provision was made by the Companies Clauses Act, 1845, or section 43 of the Companies Act, 1862, (now section 88 of the Companies Act, 1929 (*i*)) are not bills of sale within the Bills of Sale Act, 1878 (*h*).

It has been held that the words "nothing in this Act" which appear in section 17 of the Bills of Sale Act (1878) Amendment Act, 1882, (see above) mean "nothing in the Acts of 1878 and 1882 (*j*)," and therefore, in the result neither the Act of 1878 nor 1882 apply to debentures.

But the debentures of a society under the Industrial and Provident Societies Acts (which do not provide for registration) have been held to be bills of sale requiring registration (*k*).

And further, although a charge upon personal chattels by an incorporated company for the registration of which provision has been made by the Acts referred to above is not a bill of sale within the 1878 Act, yet a transfer of such a charge as security for a debt due from the mortgagee, is not valid as a charge on either the chattels or the debt, unless the requirements of the Bills of Sale Acts are fulfilled (*l*).

Although, as we have seen, the Bills of Sale Acts do not apply to mortgages and charges of incorporated companies,

(*h*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627, C. A. ; 7 Digest 30, 149, dissenting from *Jenkinson v. Brandly Mining Company* (1887), 19 Q. B. D. 568 ; 7 Digest 30, 154.

(*i*) 2 Halsbury's Statutes 829.

(*j*) *Read v. Joannon* (1890), 25 Q. B. D. 300, at p. 304 ; 7 Digest 29, 147.

(*k*) *Great Northern Ry. Co. v. Coal Co-op. Society*, [1896] 1 Ch. 187 ; 7 Digest 31, 153 ; *Re North Wales Produce Society*, [1922] 2 Ch. 340 ; Digest Supp.

(*l*) *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10 ; 7 Digest 29, 146.

yet by the Companies Acts stringent formalities are now imposed upon companies in respect of charges created or evidenced by documents which, if executed by an individual, would be bills of sale (*m*).

Section 79 of the Companies Act, 1929 (*n*), provides as follows :—

“(1) Subject to the provisions of this part of this Act every charge created after the fixed date by a company registered in England and being a charge to which this section applies shall so far as any security on the company's property or undertaking is conferred thereby be void against the liquidator and every creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced are delivered to, or received by, the Registrar of Companies for registration in manner required by this Act within 21 days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section, the money secured thereby shall immediately become payable.”

“(2) This section applies to the following charges :—

(c) a charge created or evidenced by an instrument which if executed by an individual would require registration as a Bill of Sale.”

The effect of these provisions is that every mortgage or charge by a company of personal chattels as defined by the Bills of Sale Act, 1878 (*o*) must be registered on penalty of loss of the security. It applies even to such instruments

(*m*) See *Re George Inglefield, Ltd.* (1933), 147 L. T. 411 ; Digest Supp. This was a summons taken out by a liquidator of a company which had assigned certain hire-purchase agreements and the subject-matter of them to a Finance Company, asking for a declaration that the assignments were void as being unregistered charges on book-debts. It was held on the facts that the assignments were not charges but out and out sales. See also *Olds Discount Co., Ltd. v. Playfair, Ltd.*, [1938] 3 All E.R. 275.

(*n*) 2 Halsbury's Statutes 822. This section re-enacted and extended the provisions of s. 93 of the Companies (Consolidation) Act, 1908. See Halsbury's Laws of England (2nd Ed.), Vol. V, 504 *et seq.*

(*o*) S. 4 ; 2 Halsbury's Statutes 85.

as would, if made by an individual, be incapable of registration as being impossible to be brought within the statutory form (*p*), but it only applies where it is necessary to refer to some document to show what the transaction is (*q*).

(C) FINANCE COMPANIES AND BILLS OF SALE

It is necessary to deal here with the Finance Companies and their activities which are probably the most prominent feature of modern hire-purchase practice. There are a large number of companies incorporated under the Companies Acts, whose business consists in financing hire-purchase agreements. A member of the public may desire to purchase a motor-car or a piece of expensive machinery but may find it inconvenient to find the necessary capital. In fact, it is almost unusual in these days to find a purchaser of a motor-car, or any expensive article, who has paid the whole of the purchase price at once without the intervention of the system about to be described. Even since the last edition of this book the system has been greatly extended and may now without exaggeration be said to be almost universal. It is unusual in these days to find a dealer who finances his own agreements. During the negotiations for the purchase and after the car (for example) has been selected and even sometimes after an agreement to purchase has been entered into, the prospective purchaser is informed by the motor agent with whom he is dealing that there is no need to pay for the car at once, as payment by instalments can be arranged, and the agent produces a proposal form addressed to some finance company, a form which the prospective purchaser is required to fill in, giving various particulars and requesting the finance company to let to

(*p*) *Dublin City Distillery v. Doherty*, [1914] A.C. 823, 854, 866 ; 10 Digest 789, 4946.

(*q*) *Ibid.* ; *Wrightson v. McArthur & Hutchisons*, [1921] 2 K. B. 807 ; Digest Supp. ; *Ex parte Hubbard* (1886), 17 Q.B.D. 690 ; 7 Digest 20, 90.

the prospective purchaser the selected car on the terms of a hire-purchase agreement.

The variety of the methods adopted is almost as great as that of the forms of hire-purchase agreement in use. Sometimes the hire-purchase agreement is signed contemporaneously with the proposal form, sometimes later, sometimes a guarantor is required and sometimes even the retailer is required to sign a guarantee or an undertaking to repurchase in the event of the prospective purchaser (who is thereafter always referred to as the hirer), failing to comply with the terms of the hire-purchase agreement (r). The finance company purchases the vehicle or other article from the retailer and lets it under the hire-purchase agreement to the person who wishes ultimately to purchase the vehicle. The finance companies as a rule merely deal in money, they do not handle the cars or other articles and have no means of doing so, and in fact not infrequently no employee of the company ever sees the article that is being dealt in.

All handling of articles on behalf of the companies is usually entrusted to the retailers from whom the articles were bought, and agreements are entered into between the retailers and the finance companies laying down the relations that exist between them (s). Under these circumstances it is not surprising that allegations should frequently be made that these transactions are merely shams,

(r) In one such case the Defendants (the dealers) had agreed with the Plaintiffs (a finance company) that if the latter were forced to resume possession by reason of the hirer's default, they, the Defendants, would collect the goods and repurchase them from the Plaintiffs at a price not exceeding the amount then outstanding under the hire-purchase agreement. The hirer absconded with the goods. Held, that as the Plaintiffs were unable to give delivery, the Defendants were under no obligation to pay the purchase price. (*Walling Trust, Ltd. v. Briffault Range Co., Ltd.*, [1938] 1 All E.R. 525.)

(s) Questions may arise between the owner (i.e. the finance company) and the dealer as to whether monies collected from the hirer by the dealer for the owner are impressed with a trust in favour of the owner. For principles to apply, see *Re Hallett's Estate* (1880), 13 Ch. D. 696; 12 Digest 489, 4000; *Roscoe v. Winder*, [1915] 1 Ch. 62; 12 Digest 490, 4003.

being in fact loans, by the companies to the so-called hirers to enable the latter to buy the articles, the loans to be secured by the power given to the companies by the hire-purchase agreements of seizing the articles on default, and that therefore the hire-purchase agreements are bills of sale and void for want of compliance with the requirements of the Acts.

There have been a number of decisions dealing with the various situations which have arisen in connection with this sort of transaction, and the decisions have fluctuated from one side to the other according to the facts, but in no case has it been decided (at any rate in any reported case) that the method which may be described as the orthodox method is invalid if it truly represents what the transaction is. What is called the orthodox method takes the following course—(1) proposal form by hirer before any agreement to buy from retailer, (2) purchase of car by finance company from retailer, (3) signature of hire-purchase agreement by hirer and (simultaneously or before, if required, signature of guarantee by guarantor), (4) acceptance of proposal and signature of hire-purchase agreement by finance company, (5) delivery of article to hirer by retailer. I venture to doubt whether at this late stage, after the system has passed through the scrutiny of the courts on many thousands of occasions, such a method would now be held to be necessarily void for failure to comply with the Bills of Sale Acts or Money-lenders Acts. Each case will continue to be treated on its own facts. There are even a number of cases (mostly unreported) in which the finance company purchased from the person who subsequently became the hirer and then relet to that person, and yet the Court held that the transaction was valid. Such a case was *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (t), in which H., a dealer in motor vehicles, and the defendants, a finance company, entered into a transaction for the sale of a motor

(t) [1934] 2 K. B. 305 ; Digest Supp.

lorry by H. to the defendants and the letting of the lorry by the defendants to H. on an agreement in the form of a hire-purchase agreement. The lorry did not leave the actual possession of H. until he sublet to a third party. Nevertheless, it was held that the agreement was a valid hire-purchase agreement and not a bill of sale. Another such case was *British Railway Traffic & Electric Company v. Kahn* (u). In *Elsey v. Palmer* (v) the ultimate hirer had agreed to purchase from an agent, but had not paid the purchase price. The finance company took over the contract, let the cars under hire-purchase agreement to the hirer and paid out the seller. It was held to be a valid transaction. In *Automobile & General Finance Corporation, Limited v. Morris* (w) the transaction was very similar to the "orthodox" method described above, except that the agent undertook to repurchase at the balance outstanding if the hirer made default, and nevertheless Acton, J., held that the transaction was *bona fide* and not a cloak to a moneylending or a bill of sale transaction.

On the other hand, there have been a number of unreported decisions in which the courts have decided on the facts that the transaction was not *bona fide* and did not truly represent the business that was being carried out. Such a case was *Colchester Motor Hire-Purchase Company v. Stewart* (x), where the finance company purported to buy from the defendants and relet to them, a motor-car. No money in respect of the purchase price passed, however, although a receipt was given, and there were other elements of suspicion, and it was held on the facts that the transaction was fictitious, and the hire-purchase agreement a bill of sale and void.

(u) [1921] W. N. 52 ; Digest Supp.

(v) Unreported, except in Jones and Proudfoot's *Notes on Hire-Purchase Law*, p. 27.

(w) (1929), *The Times*, 19th June ; 73 Sol. Jo. 451 ; Digest Supp.

(x) Unreported except in Jones and Proudfoot's *Notes on Hire-Purchase Law*, p. 23 and p. 37.

The hire-purchase system has been made use of to a considerable extent in complicated agreements between manufacturers, dealers and finance companies, entered into with a view to keeping the dealers provided with articles for sale, the dealers not being in a position to purchase the articles themselves. Sometimes the agreement excludes the intervention of a finance company. Apart from the difficulty that the dealer is probably a mercantile agent within the Factors Acts, and so able to give a good title to purchasers from him (y), the probability that these "stocking" agreements will be held to be bills of sale and void is greatly enhanced from the very nature of them. A case in point is *Motor Trader Finance, Ltd.* (appellants) v. *H. E. Motors, Ltd.* (respondents), which was decided in the House of Lords on the 26th March, 1936, but is unfortunately not reported.

The position, therefore, is that in every case it is a question of fact for the Court whether or not the transaction is a *bona fide* purchase and reletting, or is a loan on the security of the hire-purchase agreement, and in coming to its decision the Court will take into consideration, such facts as the order in which and the time at which the various documents come into existence, the position, financial and otherwise, of the parties, and the real results intended to be achieved (z).

(D) FINANCE COMPANIES AND MONEYLENDING

It is frequently alleged against finance companies, by way of defence to claims under hire-purchase agreements entered into under the common form arrangement already described, that the transaction is a moneylending transaction and unenforceable, because the finance company is not a registered moneylender and the provisions of the Moneylenders Act, 1900 and 1927, have not been complied

(y) Problems arising from the application of the Factors Acts are dealt with later, *post*, p. 155 *et seq.*

(z) See cases cited in this section (*passim*).

with. Such a case was *Automobile & General Finance Corporation, Limited v. Morris* (a). In that case Acton, J., decided against the contention, and the same result was arrived at in a number of unreported cases. In the recent case of *Olds Discount Company, Ltd. v. Cohen* (b), Porter, J., came to the same conclusion and it is worth citing a part of his judgment. In that case Olds Discount Co., Ltd., the finance company, had entered into the common form arrangement with a firm called Bright's Furniture Depositories, whereby they had purchased the goods in question from the firm and subsequently let them under a hire-purchase agreement, there being the common clause that Messrs. Bright's were to collect certain of the instalments from the hirer and were to guarantee the hirer's payments. In his judgment Porter, J., says :—

“ It is said by the plaintiffs : ‘ Under our arrangement with the company (Bright's Furniture Depositories), we have purchased these goods, and we are the owners of them, and we have let them out on hire through Messrs. Bright's Furniture Depositories as our agents, and we are entitled to the ownership of the goods all the way through, and to collect the money for the same, although we have made such arrangements with Messrs. Bright's Furniture Depositories as may not compel us to do so.’ ”

“ On the other hand, the defendants say that in fact there was no such sale at all, that this so-called sale was merely a sham, and that this transaction was merely a method of borrowing money by Messrs. Brights from the plaintiffs, and that, therefore, the plaintiffs were moneylenders, and, not being registered as such, they cannot recover the money. There is something to be said for that argument, but what one has to remember and I think that this might be said of almost all bodies which finance hire-purchase agreements (and they are very numerous at the present time)—is that their real function is the lending of money, and it must necessarily be so. Although that may be the object and the

(a) (1929), *The Times*, 19th June ; 73 Sol. Jo. 451 ; Digest Supp.

(b) Reported in a note to *Olds Discount Co., Ltd. v. Playfair, Ltd.*, [1938] 3 All E.R. at p. 281.

“intention for which they exist the question is not with what object they employ their money, but the method they have of employing it. If the method employed constitutes a sale, then the transaction is not only the lending of the money but also a purchase of the goods, even although it is only for the purpose of lending money that it is being done in that way. Therefore it seems to me that the question to be decided in this case is whether the plaintiffs have succeeded, by means of the form they adopted, in making a real, though technical, purchase of the goods, or whether they have merely had a security on the goods, the goods always remaining the property of Messrs. Bright's Furniture Depositories, and never having having passed to Messrs. Olds Discount Company Ltd.”

The learned judge then set out the details of the scheme and proceeded: “That kind of scheme is obviously a scheme designed to get round the dangers of the Act . . . it seems to me that they have done sufficient to keep themselves out of the danger of the Moneylenders Act.” In *Olds Discount Co., Ltd. v. John Playfair, Ltd.* (c) the scheme adopted was different. The defendants were credit drapers, selling goods by instalments (under what would be called credit-sale agreements under the Hire-Purchase Act, 1938) and the plaintiffs were a finance company. The defendants assigned to the plaintiffs for a certain sum certain book-debts, being the instalments to become due. The defendants undertook to collect these debts for the plaintiffs at their own expense. They also gave bills to secure the book-debts. It was further provided that when all the instalments were paid the plaintiff should pay a further sum in respect of the purchase price of the book-debts. It was contended that this transaction was a moneylending transaction, and unenforceable as the plaintiffs were not registered moneylenders, and the provisions of the Moneylenders Act, 1927, had not been complied with. It was held by Branson, J., that the

(c) (1938) 3 All E.R. 275.

transaction was a sale of book-debts and not a money-lending transaction and it was therefore enforceable.

The result is that every case will be decided on its own facts and that the mere fact that the ultimate object of the finance company is to lend money, is not sufficient to convert the transaction into a moneylending transaction. If the transaction is *bona fide* and the method employed to lend money is by way of a *bona fide* purchase, whether of goods or book-debts, then the transaction will not be impugned.

(E) COLLATERAL VERBAL WARRANTIES

The general rule is that parol evidence is not admissible to contradict, alter, add to, or vary a written contract or any transaction in writing (*d*). But there are certain exceptions. For instance, where there is fraud, or illegality, or failure of consideration, parol evidence may be given to prove such fraud, illegality, or failure of consideration (*e*). A collateral verbal warranty may be proved, provided the written contract is silent on the subject-matter of the collateral verbal warranty and not inconsistent with it (*f*). With regard to warranties and conditions to be implied in hire-purchase agreements, reference should be made to the following chapter, and so far as hire-purchase agreements coming within the scope of the Hire-Purchase Act, 1938 (*g*), are concerned the matter is dealt with in section 8 of that Act and in the notes thereto in Appendix A (*post*, p. 287 *et seq.*).

(*d*) *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58; 12 Digest 354, 2941.

(*e*) *Kain v. Old* (1824), 2 B. & C. 627; 39 Digest 475, 983.

(*f*) *De Lassalle v. Guildford*, [1901] 2 K. B. 215, C. A.; 17 Digest 346, 1576, where the important cases on the point were considered; *Angell v. Duke* (1875), 32 L.T. 320; 17 Digest 339, 1513. And see *Pym v. Campbell* (1856), 25 L. J. Q. B. 277; 17 Digest 307, 1190; *Goss v. Nugent*, (1833), 2 L.J. K.B. 127; 17 Digest 306, 1185.

(*g*) See *post*, p. 272.

CHAPTER 2

DUTIES, RIGHTS, AND LIABILITIES

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SECTION I—OWNER'S DUTIES AND LIABILITIES

(A) TO DELIVER THE GOODS

IN the absence of some special provision to the contrary, it is the duty of the owner to deliver the chattel to the hirer (a) at the address agreed upon, and the bailment only commences when the hirer has been given possession of the chattel (b); it follows that any damage or injury done to the chattels in course of transit or prior to delivery to the hirer, will be at the owner's risk.

If the carriage of the goods is undertaken by the hirer, then his responsibility for any accident to the goods during the carriage will depend, apart from special contract, upon whether he exercised reasonable care in the carriage of them. In the ordinary way, a hirer is not liable, except for negligence on the part of himself or his servants or agents (c). But the onus would be on the hirer to show that the injury was not due to his neglect (d).

(B) TO LEAVE THE HIRER FREE FROM INTERFERENCE

Hirer's Quiet Enjoyment.—It is the duty of the owner—implied from his entering into the agreement to let the hired chattel—to put the hirer into possession of the chattel and let him remain in peaceable possession of it, for the purpose for which it was hired (e), and for the

(a) Story on Bailments, s. 383.

(b) *National Cash Register v. Stanley*, [1921] 3 K.B. 292; Digest Supp.

(c) See section 3, *post*, as to the negligence of the hirer; *Sanderson v. Collins*, [1904] 1 K.B. 628; 3 Digest 91, 233; *Bray v. Mayne* (1818), Gow, 1; 3 Digest 89, 220; *Handford v. Palmer* (1820), 2 Brod. and Bing. 359; 3 Digest 69, 109.

(d) *Mackenzie v. Cox* (1840), 9 C. & P. 632; 3 Digest 74, 141; *Reeve v. Palmer* (1858), 5 C.B. N.S. 84; 3 Digest 109, 336; *Phipps v. New Claridge's Hotel, Limited* (1905), 22 T.L.R. 49; 3 Digest 74, 142.

(e) Story on Bailments, s. 385.

time for which it was hired (*f*). It will therefore be a violation of the owner's duty to resume possession, unless for good cause (*e.g.* repair) (*g*).

Hire-Purchase Agreement.—There is an implied warranty in a hire-purchase agreement in the ordinary form that the bailor is the true owner of the hired goods (*h*), but that warranty is fulfilled if before delivery of the goods the person purporting to let acquires the property in them, although at the time of signing the agreement he was not the owner (*i*). This is the effect of two important cases recently decided, *Karflex v. Poole* (*h*) and *Mercantile Union Guarantee Corp'n., Ltd. v. Wheatley* (*i*). In other words there is an implied warranty that the person purporting to let is the owner at the time of the bailment. Goddard, J., in the latter case, explained that it was not the intention to decide in the former case that there was such an implied warranty at the time of signing the hire-purchase agreement. The Hire-Purchase Act, 1938, has carried the position further, so far as concerns hire-purchase agreements coming within the ambit of that Act.

Hire-Purchase Act, 1938.—By section 8 of the above-named Act, the following condition and warranties are implied in all hire-purchase agreements coming within the scope of the Act (*j*) and made on and after 1st January, 1939 :—(a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods ; (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass ; (c) an implied warranty that the goods shall

(*f*) *Lee v. Atkinson & Brooks* (1609), Cro. Jac. 236 ; 3 Digest 86, 202.

(*g*) Story on Bailments, s. 385 ; see p. 75, *post*, as to repair.

(*h*) *Karflex v. Poole*, [1933] 2 K.B. 251, at p. 263 ; Digest Supp.

(*i*) *Mercantile Union Guarantee Corp'n., Ltd. v. Wheatley*, [1937] 4 All E.R. 713 ; [1938] 1 K.B. 490 ; Digest Supp.

(*j*) As to the agreements coming within the scope of the Act, see s. 1 ; Appendix A, *post*, p. 273.

be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

It is impossible to contract out of these implied warranties and conditions (*k*). Further, nothing in the section is to affect the operation of any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement (*l*). It will be observed that these implied conditions and warranties are taken almost verbatim from the Sale of Goods Act, 1893, section 12 (see Appendix D, *post*). In fact, ever since the judgment in *Karflex v. Poole* (in which Goddard, J., made some very important observations) the tendency has been to ally hire-purchase more and more with sale rather than with bailment. This really is more in accordance with reality.

(C) TO SUPPLY GOODS FIT FOR THE PURPOSE REQUIRED

Hire and Hire-Purchase.—In the absence of an express term in the contract excluding any warranty as to fitness, or defining the owner's liability, there is in all contracts of hire—and until the recent case of *Felston Tile Co. v. Winget* (*m*) it was assumed also in the case of hire-purchase—a duty upon the owner to ascertain that the chattels let on hire are reasonably fit for the purpose for which they are expressly hired, or for which from their nature they are intended to be used, and the delivery of the chattels to the hirer amounts to an implied warranty that the chattels hired for a specific purpose shall be as fit and suitable for the purpose for which they were hired (*n*)

(*k*) S. 8 (3); *post*, p. 288.

(*l*) S. 8 (4); *post* p. 288.

(*m*) [1936] 3 All E.R. 473; Digest Supp.

(*n*) "Suppose it was the duty of one to provide another with a chair. I apprehend that duty could not be said to be fitly and adequately performed by providing him with a chair having a tenpenny nail driven through the bottom of it" (*Willoughby v. Horridge* (1852), 12 C.B. 742, *per* Maule, J., at p. 748; 24 Digest 977, 107).

as reasonable care and skill can make them (o). It follows that if an owner knows of a defect in the goods hired or that they are dangerous and negligently fails to inform the hirer, he is liable for injury suffered by the hirer in consequence of the defect or the dangerous character of the goods, and he is also liable for other damage that might reasonably be supposed to be within the contemplation of the parties (p). It is negligence to hire out goods without previously taking reasonable care to ascertain that they are safe (q), and the owner is liable for injuries suffered even by strangers to the contract, if it was reasonable to assume that the owner must know that other persons than the hirer would use the goods (r).

There are passages in the judgments in *Felston Tile Co. v. Winget, Ltd.*, above referred to, to the effect that a hire-purchase agreement in the form in that case (*viz.* as in *Helby v. Matthews*) amounted to a conditional agreement to sell and that therefore the warranties and conditions under the Sale of Goods Act, 1893, were to be implied. It is possible that this part of the judgment should be regarded as *obiter*, as it was not necessary for the decision, on the facts found by the Court. Nevertheless, the tendency to assimilate hire-purchase to sale

(o) *Hyman v. Nye* (1881), 6 Q.B.D. 685; 3 Digest 87, 211; *Sutton v. Temple* (1843), 12 M. & W. 52, *per* Lord Abinger, C.B., at p. 60; 3 Digest 86, 203; *Vogan & Co. v. Oulton* (1899), 81 L.T. 435; 3 Digest 88, 216; *Chew v. Jones* (1847), 10 L.T. O.S. 231; 3 Digest 86, 204; *Jones v. Page* (1867) 15 L.T. 619; 3 Digest 87, 206; *Dare v. Bognor Urban District Council* (1912), 76 J.P. 425; 3 Digest 87, 207; *Fowler v. Lock*, (1872) L.R. 7 C.P. 272; 3 Digest 87, 209; *Mowbray v. Merryweather*, [1895] 2 Q.B. 640; 3 Digest 88, 215; but see *Story on Bailments*, s. 389. And see *Searle v. Laverick* (1874), L.R. 9 Q.B. 122, at p. 128; 3 Digest 73, 136.

(p) *Mowbray v. Merryweather* (*supra*), *per* Lord Esher, at p. 643; *Vogan & Co. v. Oulton* (*supra*). In these cases hirers recovered from the owners compensation they had had to pay to their employees by reason of defects in hired goods. See also *Nokes v. Kent Co.* (1913), 23 A.W.R. 771; 3 Digest 114, 381, *i* (a Canadian case). In this case the goods were let under a hire-purchase agreement.

(q) *Jones v. Page* (*supra*).

(r) *Hopkins v. Great Eastern Railway* (1895), 12 T.L.R. 25, C.A.; 3 Digest 114, 380; *Hawkins v. Smith* (1896), 12 T.L.R., 532; 3 Digest 114, 381; *White v. Steadman*, [1913] 3 K.B. 340; 3 Digest 114, 382.

in preference to bailment is becoming continually more marked and has been recognised in the Hire-Purchase Act, 1938, by the importation from the Sale of Goods Act, 1893, of warranties and conditions as to title, merchantability and fitness substantially in the same form. It is fair to assume that the decision in *Felston Tile Co. v. Winget* will be followed.

In *Hyman v. Nye* (s), the plaintiff hired from the defendant a carriage for a specific journey. In the course of the journey, owing to the breaking of a bolt in the underpart of the carriage, an accident occurred and the plaintiff was injured. In an action for negligence, the jury were directed to find for the defendant, if they thought he took all reasonable care to provide a proper carriage, and they did so, with an express finding that the carriage was reasonably fit for the purpose for which it was hired and that the defect in the bolt could not have been discovered by the defendant by the exercise of ordinary care and skill. It was held on appeal that the direction was wrong, that it was the duty of the defendant to supply a carriage as fit for the purpose as care and skill could make it, and the evidence was not such as to show that the breakage was an accident and unavoidable by any care and skill, or such as to warrant the jury in finding that the carriage was reasonably fit. Lindley, J. (as he then was), said at p. 687 :—

“ A person who lets out carriages is not, in my opinion, responsible for all defects, discoverable or not ; he is not an insurer against all defects . . . but . . . he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it.”

The owner is in consequence liable, not only for the immediate results of his lack of care in supplying an article with some defect of which he was or ought with

(s) (1881), 6 Q.B.D. 685 ; 3 Digest 87, 277.

reasonable care to have been aware, but also for any other consequences which might reasonably be held to be within the contemplation of the parties, *e.g.*, compensation or damages which the hirer had to pay to his servants who suffered injury owing to defective tackle (*t*).

Nor is the owner protected merely by the fact that the hirer has seen the article before hiring it, and even inspected it for a purpose other than that of ascertaining whether it was safe (*u*). It was said by Chief Baron Kelly, in his judgment in *Jones v. Page* (*u*):—

“ Then as to the second point it has been said that the plaintiff selected this carriage himself. Now we know that persons often hire carriages as they do houses for a considerable length of time in a state of non-repair. There they are, of course, aware of the defects which are patent and known to them. But to say that because a person hiring a carriage looks at and selects a vehicle therefore the person letting it out to hire is to be relieved of all liability with respect to its safety would, indeed, be a very dangerous doctrine. A man, as the plaintiff did here, selecting a carriage on account of its size and capability to carry a certain number of passengers, has nothing whatever to do with the question of its safety, nor is it necessary that he should look to the state of the wheels and the lynchpins or suchlike. It is enough that there appears to be no external visible defect.”

A warranty of fitness extends to a servant of the owner hired with the chattel, *e.g.*, a coachman (*v*), but only to those acts of the servant which are within the scope of his authority (*w*).

If, however, no reasonable amount of care could have discovered the defect, then the owner is not liable (*x*).

(*t*) *Vogan & Co. v. Oulton* (*supra*); *Mowbray v. Merryweather* (*supra*).

(*u*) *Jones v. Page* (1867), 15 L.T. 619, 620; 3 Digest 87, 206.

(*v*) *Abrahams v. Bullock* (1902), 86 L.T. 796; 3 Digest 88, 217.

(*w*) *Cheshire v. Bailey*, [1905] 1 K.B. 237; 3 Digest 88, 218; *Mintz v. Silverton* (1920), 36 T.L.R. 399; 34 Digest 133, 1016.

(*x*) *Readhead v. Midland Railway Co.* (1867), L.R. 2 Q.B. 412; 8 Digest 71, 480; see also *Christie v. Griggs* (1809), 2 Camp. 79; 8 Digest 75, 515; *Searle v. Laverick* (1874), L.R. 9 Q.B. 122; 3 Digest 73, 136.

It was said by Matthew, J. (*obiter*) in *Hyman v. Nye*, as to the liability of a hirer:—

“ The cases referred to by my brother Lindley, seem to show that there is no distinction in this respect between contracts for the sale and for the hire of an article for a specific purpose, where trust is reposed in the person who in the ordinary course of business sells or lets on hire. The purpose and use, the time for which the article is intended to be used, seem to me the essential part of the contract ” (y).

It must be borne in mind, however, that the law as to sale of goods has been codified since his judgment, and is now contained in those sections of the Sale of Goods Act, 1893, relating to warranties on sale of goods, and further there are dicta to the contrary in a more recent case (z).

In the case of a mere gratuitous loan of a chattel, the lender is only liable to the borrower for injury caused by a defect in the chattel, if he knew of the defect at the time of the loan, and either concealed it from the borrower or was guilty of gross negligence in not informing him of it (a).

The duty of the owner to supply goods fit for the purpose for which they are hired extends not only to the hirer, but also to all persons whom the owner knows or may reasonably expect will use the goods (b), but he is under no obligation to these third parties to see that the goods are kept in repair (c).

Hire-Purchase Act, 1938.—This Act deals specifically

(y) *Hyman v. Nye* (*supra*), per Mathew, J., at p. 690.

(z) *Gedding v. Marsh*, [1920] 1 K.B. 668, at p. 672; 39 Digest 443, 723.

(a) *Blakemore v. Bristol & Exeter Railway Co.* (1858), 8 E. & B. 1035; 3 Digest 69, 111; *Coughlin v. Gillison*, [1899] 1 Q.B. 145; 3 Digest 70, 117.

(b) *Hawkins v. Smith* (1896), 12 T.L.R. 532; 3 Digest 114, 381; *George v. Skivington* (1869), L.R. 5 Ex. 1; 39 Digest 441, 705; *White v. Steadman*, [1913] 3 K.B. 340; 3 Digest 114, 382, and see *Heaven v. Pender* (1883), 11 Q.B.D. 503; 34 Digest 192, 1570. But see *Bates v. Batey*, [1913] 3 K.B. 351; 39 Digest 459, 857.

(c) *Hopkins v. Great Eastern Railway* (1895), 12 T.L.R. 25, C.A.; 3 Digest 114, 380.

with the conditions and warranties to be implied in relation to hire-purchase agreements to which the Act applies, and section 8, subsections (1) and (2) and (3) define those relating to the quality and fitness of the goods (*d*). By section 8, subsection (1) (*d*), it is provided that "except where the goods are let as secondhand goods and the note or memorandum made in pursuance of section two of this Act contains a statement to that effect there shall be an implied condition that the goods shall be of merchantable quality, so however that no such condition shall be implied by virtue of this paragraph as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made, or if the hirer has examined the goods or a sample thereof as regards defects which the examination ought to have revealed." This warranty is to be implied notwithstanding any agreement to the contrary (*d*). By subsection (2), it is provided that where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose. The owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in subsection (2) of this section unless he proves that before the agreement was made the provision was brought to the notice of the hirer and made clear to him (*d*).

(D) AS TO REPAIR

Repair.—The duty of keeping the hired goods in repair during the hiring period is usually provided for in the agreement and is as a rule made to fall on the hirer.

Where the agreement is silent on the subject of repairs, then the duty to repair during the hiring period would

(*d*) Hire-Purchase Act, 1938, s. 8; *post*, p. 287.

seem to depend on the circumstances of the case, but there is very little authority on the point. According to dicta in the case of *Robertson v. Amazon Tug and Ligherage Company* (e), there is at least an obligation on the owner to keep the chattel between the date of the contract of hiring and the handing over in pursuance of the contract, in repair, *i.e.*, not to allow it to become in a worse condition than at the date of the contract. If the hiring is for a definite period, then a reasonable inference is that the owner has undertaken to provide an article in such a condition that it will last for the time for which it is hired, and if during that time, through no fault of the hirer, the goods lose that condition, it would by implication, be the duty of the owner to repair it and put it back into that condition (f). But in the case of a hiring for no definite period, there would seem to be no duty on the owner to repair, and the remedy of the hirer would be to terminate the hiring when the goods ceased to be fit for the purpose for which they were hired (g).

At any rate, it appears clear that, unless the contract expressly so provides, there is no obligation on the hirer

(e) (1881), 7 Q.B.D. 598; 3 Digest 88, 272. The contract in the case, however, was not a contract of bailment.

(f) This is the effect of foreign and Roman Law on the subject. See Story on Bailments at s. 383, where he says: "According to the foreign and Roman law, the letter, in virtue of the contract, impliedly engages to allow to the hirer the full use and enjoyment of the thing hired. . . . This implies an obligation . . . to keep the thing in suitable order and repair for the purposes of the bailment." And at s. 388 he says: "This" (*i.e.* the duty to repair) "is considered by Pothier as an obligation arising by operation of law from the fact that the enjoyment or use, contemplated by the contract, cannot otherwise be obtained. Thus, if a loom is let to hire for a number of years, the letter is bound to keep it in suitable repair during the whole period, unless the necessity of repairs arises from the fault of the hirer. But, however correct this may be as a general principle, it is affected by all the contrary implications which may arise from the usages of trade, and the customs of the place, as well as from any positive compact between the parties." cf. *Hart v. Wright* (1885), 1 T.L.R. 538; 3 Digest 95, 253. This was a case of purchase by instalments and not hire-purchase.

(g) *Hopkins v. Great Eastern Railway Co.* (1895), 12 T.L.R. 25, C.A.; 3 Digest 114, 380.

to execute any repairs which are not necessitated by his own failure to take reasonable care of the chattels (*h*).

Hire-Purchase Act, 1938.—It is expressly provided by section 4 (2) of this Act that, so far as concerns the hire-purchase agreements to which the Act applies, where a hire-purchase agreement has been determined by a hirer under section 4 (1) of the Act the hirer shall, if he has failed to take reasonable care of the goods, be liable to pay damages for the failure. This section only applies to hire-purchase agreements made after the commencement of the Act, *viz.* 1st January, 1939.

SECTION 2—OWNER'S RIGHTS

(A) TO RECEIVE THE RENT

The first and most obvious right of the owner, both in hire-purchase agreements and agreements for simple hire, is to receive the hire-rent provided for in the agreement. In the absence of stipulations as to time of payment, the law infers an obligation to pay in a reasonable time (*i*).

(*h*) In the case of *Hyman v. Nye* (1881), 6 Q.B.D. 685 ; 3 Digest 87, 217, at p. 688, Lindley, J., said that the owner of goods let out on hire had it in his power not only to see that the goods were in a proper state and keep them so and thus protect himself from risk, but also to charge his customers enough to cover his expenses. "If a carriage be let for hire and it breaks down on the journey, the letter of it is liable and not the party who hires it" (*Sutton v. Temple* (1843), 12 M. & W. 52, *per* Lord Abinger, C.B., at p. 60 ; 3 Digest 86, 203).

In *Reading v. Menham* (1832), 1 Mood. & R. 234 ; 3 Digest 91, 235, it was held that where the owner of a carriage let it to the hirer on terms that he, the owner, was "to keep the same in perfect repair without any further charges whatever," the hirer was not liable for repairs made necessary by accident during the hiring period. In the case of *Pomfret v. Ricroft* (1671), 1 Saund. 321, at p. 323 ; 3 Digest 70, 178, Lord Hale said : "If I lend a piece of plate and covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use and wearing without my fault, no action of covenant lies against me."

This, however, was merely *obiter* and unnecessary for the decision of the case under consideration.

(*i*) Co. Litt. 208, *a.b.* *Taylor v. Great Northern Railway Co.* (1866), L.R. 1 C.P. 385 ; 8 Digest 25, 144.

Even where the time of payment is provided for, it is not as a rule now treated as of the essence of the contract, unless it is expressly so stated, or there are provisions from which such intention should be inferred (j). In most hire-purchase agreements it is provided that the hirers shall "punctually" pay the hire rent on the dates provided and in default of so doing the owner shall have the right to retake possession of the goods (k). It was decided in *Leeds and Hanley Theatre of Varieties v. Broadbent* (l) (not a case concerned with hiring) that "punctually" means "on the day named," and in *Cramer v. Giles* (m), where a piano was let on the hire-purchase system on the terms, *inter alia*, "that in case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to the owner, who shall thereupon be entitled to resume possession of the instrument," it was held that on the hirer defaulting, the owner was entitled to the possession of the piano, although the instalments in arrear were tendered by the hirer before action was brought. In fact, although the time of payment is thus made of the essence of the contract in practically all hire-purchase agreements, in practice, it is rare to find payments paid punctually, or punctuality being insisted upon by the owners. The right of the owner to recover arrears of hire-rent is not lost by the exercise of the right to retake possession (n),

(j) Law of Property Act, 1925, s. 41; 15 Halsbury's Statutes 217. And see Sale of Goods Act, 1893, s. 10(1); 17 Halsbury's Statutes 616, whereby stipulations as to time of payment in contracts for sale of goods are excluded from the general rule that in mercantile contracts, stipulations as to time are of the essence of the contract. See *Reuter v. Sala* (1879), 4 C.P.D. 239, C.A. at p. 249; 39 Digest 579, 1827; *Thames Sack and Bag Co., Limited v. Knowles & Co., Limited* (1918), 88 L.J. K.B. 585; 39 Digest 424, 560.

(k) But as from 1st January, 1939, this right will be subject to the restriction imposed by s. 11 of the Hire-Purchase Act, 1938. (See *post*, Appendix A, p. 291.)

(l) [1898] 1 Ch. 343; 35 Digest 297, 488. See also *MacLaine v. Gatty*, [1921] 1 A.C. 376; 35 Digest 660, 3950.

(m) (1883), 1 Cab. & Ellis, 151; 3 Digest 95, 256.

(n) *Brooks v. Beirnsstein*, [1909] 1 K.B. 98; 3 Digest 96, 258.

unless the agreement is not really a hire-purchase agreement, *i.e.*, an agreement to let with an option to purchase, but is in truth an agreement to sell (*o*), in which case his remedy is to sue for damages for breach of contract (*p*).

Neither the giving by the hirer of bills of exchange or promissory notes as collateral security for the payment of the total sum required to purchase the goods let under a hire-purchase agreement, nor the discounting of them, converts the agreement into an out and out sale or into a bill of sale or sale on credit or an agreement for sale (*q*).

Where the hire-purchase agreement amounts in fact to an agreement to buy by instalments, the so-called hirer (really buyer) is entitled to anticipate the time of payment (*r*) as the provision of payment by instalments is solely for the purchaser's benefit.

If the initial payment is paid by way of hire, the hirer is not entitled to be refunded any portion of it as being an advance of rent, on the hiring being determined (*s*).

An unsatisfied judgment for the whole of the arrears of instalments required to purchase a chattel let under a hire-purchase agreement does not preclude the owner from suing to recover possession (*t*).

(*o*) *Hewison v. Ricketts* (1894), 71 L.T. 191; 3 Digest 96, 257; *A.-G. v. Pritchard* (1928), 97 L.J. K.B. 561; Digest Supp. As to the measure of damages, see *Taylor v. Thompson*, [1930] W.N. 16; Digest Supp., where the agreement amounted to an agreement to buy. The date of the last instalment having passed, it was held that the owner was entitled to judgment for the amount of the outstanding instalments plus interest on the instalments lost by hirer's (buyer's) failure to pay. Also *British Berna Motor Lorries v. Inter-Transport Co., Ltd.* (1915), 31 T.L.R. 200; 3 Digest 95, 252, where the agreement was also a agreement to buy. The car in question was impressed by the War Office and it was held that the owners were entitled to the amount of the outstanding instalments, the hirer (purchaser) having received compensation equal to the value of the car.

(*p*) *A.-G. v. Pritchard* (*supra*).

(*q*) *Re Rankin v. Shilliday*, [1927] N.I. 162; Digest Supp.; *Modern Light Cars v. Seals*, [1934] 1 K.B. 32; Digest Supp.

(*r*) See *Lancashire Waggon Co., Ltd. v. Nuttall* (1879), 42 L.T. 465; 3 Digest 95, 251. As to the correction to tender, see *Taylor & Wylie v. Lockhead, Ltd.*, [1912] S.C. 978; 3 Digest 95, 251 *i*.

(*s*) *Auto Supply Co., Ltd. v. Raghunatha Chetty* (1929), I.L.R. 52 Mod. 829; Digest Supp.

(*t*) *S. Beds. Electrical Finance, Ltd. v. Bryant*, [1938] 3 All E.R. 580.

If the hirer has refused to accept delivery of the chattel hired, the owner's remedy is not to sue for the instalments as the respective dates for payment of the instalments arrive, since until the hirer has taken possession of the chattel the hiring does not commence and no debt becomes due, but his remedy is to sue for damages for breach of contract (*u*).

If, however, in a hiring for a time certain, the hirer accepts the goods and subsequently returns them before the expiry of the time agreed, the owner is entitled to the hire-rent for the whole time, unless by *e.g.*, selling the goods after return, it may be inferred that he has rescinded the agreement (*v*).

In the case of a hire-purchase agreement, however, to which the Hire-Purchase Act, 1938, applies, the amount payable by a hirer on terminating such agreement in accordance with the provisions of section 4 of the Act is governed by the terms of that section (*w*).

It was held in *British Stamp and Ticket Automatic Delivery Co. v. Haynes* (*u*), that the measure of damages for failure to accept delivery of goods hired, was, (a) the amount of the rent from delivery to expiration of such reasonable time as the plaintiffs would have required thereafter to relet the goods, (b) the cost of the transport of the goods, (c) commission to the agent who procured the contract, if payable notwithstanding breach by the hirer of the contract to hire.

Compensation for Depreciation.—It is frequently provided in hire-purchase agreements that if the owner recovers possession or the hirer returns the goods before a certain sum has been paid by way of rent and for the option to purchase, the hirer is to pay a further sum by way of compensation for depreciation of the goods. It

(*u*) *National Cash Register v. Stanley*, [1921] 3 K.B. 292; Digest Supp.; *British Automatic Co. v. Haynes*, [1921] 1 K.B. 377; 17 Digest 127, 353.

(*v*) *Wright v. Melville* (1828), 3 C. & P. 542, N.P.; 3 Digest 92, 239.

(*w*) See *post*, p. 281.

has been decided in a number of cases that the clause is not a penalty but a genuine pre-estimate of damage (x). Now by sections 4 and 5 of the Hire-Purchase Act, 1938, the maximum additional sum that a hirer can be called upon to pay on the determination of an agreement to which the Act applies, or of the bailment under such agreement, is the difference between the sums paid and the sums due in respect of the hire-purchase immediately before the termination and one-half of the hire-purchase price.

(B) TO RETAKE POSSESSION TO REPAIR

To Retake for Repair.—The owner has a right to retake possession of goods hired in order to repair them where by the contract between the parties the duty to repair is expressly or impliedly on the owner (y). The owner must return the goods within a reasonable time to the hirer, and it may be that in certain circumstances, the hirer would be entitled to a rebate on his rent during the time the article was being repaired (z). There are no decided cases on this point, which seldom arises in practice, but presumably these principles would apply as well in hire-purchase agreements in ordinary form and in agreements for simple hire.

(C) TO RETAKE POSSESSION FOR CONDUCT INCONSISTENT WITH HIRING

Simple Hire.—In cases of simple hire the effect of the authorities appears to be that if the hirer does anything wholly inconsistent with the terms of the contract,

(x) *Associated Distributors, Ltd. v. Hall & Hall*, [1938] 1 All E.R. 511; *Elsev & Co., Ltd. v. Hyde* (unreported); *Chester & Cole, Ltd. v. Wright* (unreported); *Roadways Transport Development, Ltd. v. Browne Gray* (1927) (unreported).

(y) Story on Bailments, s. 385.

(z) *Pothier, Contrat de Louage*, s. 77.

e.g., by selling or pledging them, the hiring is determined (*a*), and the owner is entitled to possession of the goods hired (*b*) and is entitled to take them wherever he may find them, so long as he does not commit a trespass in so doing. It was said by Abbott, J., in *Loeschman v. Machin* (*a*) :—

“ The general rule is that if a man buy goods or take them on pledge and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser.”

And in *Cooper v. Willomatt* (*a*) in the judgment of Tindal, C.J., these words appear :—

“ and it seems to me that if Savage put the goods into the possession of another meaning to give that other a larger interest than he himself possessed, he must at all events be held to have parted with the limited interest he did possess.”

In *Fenn v. Bittleston* (*c*) approving *Loeschman v. Machin*, and *Cooper v. Willomatt*, Parke, B., says :—

“ The transfer of the property absolutely was, therefore, unquestionably wrong and it operated as a disclaimer of tenancy at Common Law.”

And in *R. v. Poyser* (*d*), Baron Alderson directed the jury that the original bailment of the goods by the prosecutor to the prisoner was determined by his (the prisoner's) unlawful act in pawning part of them. But if the act, though possibly a breach of contract, is not wholly incon-

(*a*) *Cooper v. Willomatt* (1845), 1 C.B. 672 ; 3 Digest 106, 316. “ The rule is that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment.” (*Bryant v. Wardell and Others* (1848), 2 Ex. 479, *per* Pollock, C.B., at p. 482 ; 3 Digest 106, 319.) See also *Fenn v. Bittleston* (1851), 7 Ex. 152 ; 3 Digest 106, 317, and *Loeschman v. Machin* (1818), 2 Stark 311 ; 3 Digest 106, 315 ; *Plasycoed Collieries Co., Limited v. Partridge, Jones & Co., Limited*, [1912] 2 K.B. 345 ; 3 Digest 107, 327.

(*b*) As to the owner's remedies against third parties, see Chapter 6, p. 153 *et seq.*, *post*.

(*c*) (1851), 7 Ex. 152 ; 3 Digest 106, 317.

(*d*) (1851), 2 Den. 233 ; 3 Digest 107, 320.

sistent therewith, the owner's remedy lies in damages ; as for instance, if a person should hire a horse for a certain time to go to a particular place, the owner cannot forcibly seize the horse because the hirer proceeded to another place (e).

Hire-Purchase.—In hire-purchase agreements, however, which contain, in addition to the element of bailment, the element of sale (f), although the general rule would appear to be the same, it does not necessarily follow that what would clearly be conduct wholly inconsistent with a simple bailment would be inconsistent with hire-purchase. For instance, it was decided in the case of *Whiteley v. Hilt* (g) that a hirer had an assignable interest in a hire-purchase agreement, which was in the form of an agreement to hire with an option in the hirer to buy, together with a redemption clause giving the hirer the right to resume the hiring on certain conditions if the owner should retake possession of the article. It was held that the hirer, in selling her interest in the article before she had completed payment of the instalments, had not repudiated the agreement by her conduct.

In the ordinary hire-purchase agreement the question of resuming possession is specifically dealt with and it is as a rule provided that in the event of the hirer committing any breach of any of the provisions of the agreement, the owner shall be entitled without notice to enter on the hirer's premises to retake possession of the goods (h). In the absence of such a right to seize the owner's remedy is by action for detinue or conversion, unless he happens to find the goods where he can take them without trespass

(e) *Lee v. Atkinson & Brooks* (1609), Cro. Jac. 236 ; 3 Digest 108, 327. And see *Whiteley v. Hilt*, [1918] 2 K.B. 808 ; 3 Digest 107, 325.

(f) *Karflex, Ltd. v. Poole*, [1933] W.N. 91 ; [1933] 2 K.B. 251 ; Digest Supp.

(g) [1918] 2 K.B. 808 ; 3 Digest 107, 325.

(h) *Ex parte Whittaker, re Gelder*, [1880] W.N. 171 ; [1881] W.N. 37 ; *Leman v. Yorkshire Railway Waggon Co.* (1881), 50 L.J. Ch. 293 ; 31 Digest 96, 2363.

or breach of the peace. If the owner is successful in seizing the goods, he is not entitled to retain goods or accessories belonging to a third party, which have been affixed to the hired chattels during the hiring, under another hire-purchase agreement (*i*).

Hire-Purchase Act, 1938.—The right to recover from the hirer possession of goods let under hire-purchase agreements to which the above Act applies has been drastically curtailed by sections 5 and 11 of the Act. Section 5 provides that any term in such an agreement giving the owner a right to enter upon premises for the purpose of taking possession of the hired goods or by which an owner is relieved from liability for the entry is void, and section 11 in effect provides that after one-third of the hire-purchase price has been paid or tendered by the hirer or guarantor, the owner shall not enforce any right to recover possession of the goods otherwise than by action (*j*). But by subsection (3) of section 11 it is provided that the section shall not apply to cases where the hirer has determined the agreement or the bailment by virtue of any right vested in him. This leaves the position in the air in cases where the hirer has determined the agreement and the bailment not by virtue of any right but by conduct inconsistent with the agreement. It would appear that where the goods have got into the hands of third parties, the owner can retake possession, but where they remain in the hands of the hirer he must bring his action in accordance with the provisions of the Act (*k*). This section is probably the most far-reaching provision contained in the new Act, which came into force on the 1st January, 1939, and the section applies to hire-purchase agreements coming within the scope of the

(*i*) *Bergougnan v. British Motors, Ltd.* (1929), 30 S.R.N.S.W. 61; Digest Supp. (Australia).

(*j*) Hire-Purchase Act, 1938, s. 11 (1); *post*, p. 291.

(*k*) These provisions are contained in sections 12 to 15 of the Act. See *post*, pp. 293-301.

Act, whether the agreements were made before or after the commencement of the Act (l).

The penalties for contravening this provision are exceedingly severe and are as follows: (a) the hirer is released from all liability under the agreement and is entitled to recover from the owner in an action for moneys had and received, all moneys paid by him under the agreement or under any security given by him in respect thereof. (b) Any guarantor is entitled to recover from the owner, in an action for moneys had and received, all sums paid by him under the guarantee or under any security given by him in respect thereof (m).

Licence to Enter and Seize.—A mere licence not under seal to enter upon land is to be distinguished from an easement, in that the former is generally personal, does not run with the land, does not require a deed for its creation, and is generally revocable at the will of the person granting it (n). A licence is distinguishable from a tenancy, in that to create the latter it is necessary that it should be the intention of the parties that the tenant shall have exclusive possession of the property, whereas this is not necessary in the case of a licence (o).

Although a mere licence and nothing more, not under seal, is revocable at the will of the grantor, a licence coupled with a grant or interest is irrevocable (p), and even a revocable licence may become irrevocable, upon

(l) Hire-Purchase Act, 1938, s. 20 (1) (b); *post*, p. 305.

(m) *Ibid.*, s. 11 (2); *post*, p. 292.

(n) *Fentiman v. Smith* (1803), 4 East, 107, 109; 19 Digest 21, 80; *Cocker v. Cowper* (1834), 1 Cr. M. & R. 418; 19 Digest 27, 120; *Hyde v. Graham* (1862), 1 H. & C. 593; 19 Digest 22, 82; *Taplin v. Florence* (1851), 10 C.B. 744; 30 Digest 512, 1672a; *Wood v. Leadbitter* (1845), 13 M. & W. 838; 30 Digest 515, 1708. This case has, however, been stated to be obsolete in *Hurst v. Picture Theatres, Ltd.* (1913), 30 T.L.R. 98, by Channel, J., and in the same case in the C.A., [1915] 1 K.B. 1, by Buckley and Kennedy, L.J.J., Phillimore, L.J., dissenting (30 Digest 513, 1682).

(o) *Hancock v. Austin* (1863), 14 C.B.N.S. 634; 30 Digest 504, 1623.

(p) *Wood v. Leadbitter* (*supra*); *Wood v. Manley* (1839), 11 Ad. & El. 34; 39 Digest 548, 1577; *Taplin v. Florence* (1851), 10 C.B. 744; 30 Digest 512, 1672a.

being acted upon (q). For the purpose of coming to a decision as to whether a licence given by a hirer to the owner to enter upon the hirer's premises and seize the hired goods is irrevocable, it is important to determine what sort of interest, coupled with a licence, will render the latter irrevocable. The following passage from C. J. Vaughan's judgment in *Thomas v. Sorrell* (r) was cited with approval in *Taplin v. Florence* (s), by Jervis, C.J., and by Alderson, B., in *Wood v. Leadbitter* (s).

" A dispensation or licence properly passeth no interest
 " nor alters or transfers property in anything, but only
 " makes an action lawful which without it had been
 " unlawful, as a licence to go beyond the seas, to hunt
 " in a man's park, to come into his house are only actions
 " which without licence had been unlawful. But a
 " licence to hunt in a man's park and carry away the
 " deer killed to his own use, to cut down a tree in a man's
 " ground and to carry it away the next day after to his
 " own use, are licences as to the acts of hunting and
 " cutting down the tree, but as to the carrying away of
 " the deer killed and tree cut down they are grants. So
 " to license a man to eat my meat or to fire the wood
 " in my chimney to warm him by, as to the actions of
 " eating, firing my wood and warming him, they are
 " licences; but it is consequent necessarily to those
 " actions that my property may be destroyed in the meat
 " eaten and in the wood burnt, so as in some cases by
 " consequent and not directly and as its effect, a dis-
 " pensation or licence may destroy or alter property."

In *Wood v. Manley* (t) where goods were sold on the terms that the buyer should be entitled to come upon the land and get them, it was held that the licence was irrevocable, but it is not very clear from the judgments in that case whether the decision depended upon the fact

(q) *Taylor v. Waters* (1816) 7 Taunt. 374; 30 Digest 505, 1629; *Wallis v. Harrison* (1838), 4 M. & W. 538; 19 Digest 28, 130.

(r) (1673), 1 Lev. 217; 30 Digest 501, 1594.

(s) (*supra*).

(t) (1839), 11 Ad. & El. 34; 39 Digest 548, 1577. See also *Wood v. Leadbitter* (*supra*); *Taplin v. Florence* (1851), 10 C.B. 744; 30 Digest 512, 1672a.

that the licence was coupled with a grant or interest in the goods, or on the fact that the licence had been acted upon by the very fact of the purchase on those terms. Lord Denman, C.J., says :—

“ A licence given and acted upon is irrevocable.”

Patteson, J., appears to put it upon a ground analogous to estoppel. He says :—

“ . . . all the cases proceed on the principle that a man,
“ who by consenting to certain terms induces another to
“ do an act shall not afterwards withdraw from those
“ terms.”

In *Taplin v. Florence* (*u*), it was held that an auctioneer who was employed to sell goods by auction, had not an interest in the goods sufficient to make the licence to enter the premises for that purpose irrevocable. A hirer, however, has an interest in the hired goods—a right to possession—and it would appear that the true conclusion from the various cases cited is, that, if the hirer by the hire-purchase agreement gives the owners of the goods a licence to enter the hirer's premises and to seize the goods, *i.e.*, to take what interest in the goods the hirer has, that is the grant of a licence coupled with an interest and is irrevocable. Even in cases where the licence is, in fact, revocable, it may be that damages are recoverable for the revocation (*v*).

Not a Penalty.—A proviso in a hiring or hire-purchase agreement that the owner shall have power to retake possession for breach, is not in the nature of a penalty (*w*), but if the hire-purchase agreement is a colourable transaction (*x*), and in its effect is a bill of sale, then, in the absence of registration, it is void and the person seizing

(*u*) (*supra*).

(*v*) *Kerrison v. Smith*, [1897] 2 Q.B. 445 ; 30 Digest 512, 1675.

(*w*) *Sterne v. Beck* (1863), 1 De G. J. & Sm. 595 ; 17 Digest 408, 2165 ; *Protector Endowment Loan and Annuity Company v. Grice* (1880), 5 Q.B.D. 592, C.A. ; 7 Digest 220, 628.

(*x*) See p. 43, *ante*.

the goods will be liable to an action in respect of such seizure (y).

A Peaceable Retaking.—Possession must be retaken peaceably, and a provision in the contract that the owner may use force or break open outer and inner doors in order to enter premises to retake possession of goods, is of doubtful utility and undesirable, as it might be suggested that such a clause is in the nature of a licence to commit a crime contrary to the Forcible Entry Act, 1381, and therefore void. In two bills of sale cases, *Re Morritt, Ex parte Official Receiver* (z) and *Lumley v. Simmons* (a), clauses authorising the grantee to seize the goods under certain circumstances and to break open outer and inner doors for the purpose of obtaining entry were held not to avoid the bills of sale for failing to comply with the form in the Schedule to the Bills of Sale Act (1878) Amendment Act, 1882, section 9 (b), but the point was not taken that the clause was void as being a licence to commit a crime. There appears to be no direct authority on the point (c). If the entry cannot be made peaceably, the owner should, however, always resort to the courts (d).

The Forcible Entry Act, 1381 (e), provides,

“ that none from henceforth make any entry into any lands and tenements but in case where entry is given by the law : and in such case, not with strong hand, nor with multitude of people, but only with peaceable and easy manner : and if any man from henceforth do to the

(y) *Beckett v. Tower Assets Company*, [1891] 1 Q.B. 638 ; 3 Digest 94, 250.

(z) (1886), 18 Q.B.D. 222 ; 7 Digest 65, 376.

(a) (1887), 34 Ch. D. 698 ; 7 Digest 66, 384.

(b) 2 Halsbury's Statutes, 104, 107.

(c) For an illuminating discussion on the law relating to Forcible Entries, see the case of *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720 ; 31 Digest 49, 1968, which decided that where landlords had entered upon premises under circumstances which were assumed to amount to a forcible entry, and had then evicted the plaintiffs who were trespassers and their goods using no more force than was necessary, the plaintiffs were not entitled to recover damages in civil proceedings.

(d) *Ibid.* ; *Edwick v. Hawkes* (1881), 18 Ch. D. 199, *per* Fry, J., at p. 212 ; 15 Digest 651, 6958.

(e) 10 Halsbury's Statutes 310.

contrary and thereof be duly convict, he shall be punished by imprisonment of his body."

The offence is a misdemeanour both at Common Law (f) and by the above Statute, and is punishable by fine and imprisonment.

It has been suggested that the Statute only applies in cases where the entry is made for the purpose of gaining possession of land and not where the purpose is to regain possession of chattels. The contention is based on a statement in 1 Hawkins, C. 64. s. 34, to the effect that:—

"It seems clear that no one can come within the danger of these Statutes by a violence offered to another in respect of a way or such like easement, which is no possession."

This statement, however, does not, when carefully examined, support the contention, and the Act itself does not deal with the purpose of the entry but merely the manner of it. It is very much to be doubted whether modern judicial opinion would lend itself to such a fine distinction, the object of the Act being to prevent turbulent and riotous assertions of right, and such methods are equally undesirable whether the right is in respect of land or chattels. In fact, in the case of *R. v. Fulford & Others* (g), tried at the Central Criminal Court in April, 1924, five men were convicted of forcibly entering a tenement to regain possession of a mangle, but the point, if taken at all, was not strenuously pressed.

No actual violence to any person is necessary to constitute the offence of forcible entry, if there is some violence in the course of the entry, e.g. breaking open doors, threats, arms or overwhelming numbers (h).

(f) *R. v. Blake* (1765), 3 Burr. 1731; 15 Digest 651, 6961; *R. v. Wilson* (1799), 8 Term. Rep. 357; 15 Digest 650, 6955.

(g) This case is reported in *The Times* of 8th April, 1924. See also *Lucas v. Bernard* (1894), Q.R. 5 S.C. 529; 3 Digest 95, 256, i (Canada); *Ferguson v. Roblin* (1888), 17 O.R. 167; 3 Digest 96, 256, iv (Canada); *Wiener v. Phillips (Belfast), Ltd.* (1915), 49 I.L.T. 205; 3 Digest 96 256, v (Ireland).

(h) 1 Hawkins, P.C. c. 28, ss. 26, 27; *Milner v. Maclean* (1825), 2 C. & P. 17; 15 Digest 651, 6965.

A mere trespass is not enough to support an indictment, there must be force or a show of force (*i*).

It is not a forcible entry to enter by an open window, or to obtain entry by a trick (*j*). A person who has entered peaceably is entitled to use reasonable force in ejecting a trespasser (*k*) or in taking possession of his goods, wrongfully placed there by the person in possession of the premises (*l*).

This is stated to be based on an implied licence by the wrong-doer to the owner to come and take his goods (*m*), but it is to be noted that in none of the cases does the Court go so far as to say that the owner may use force to enter—forcible entry is not countenanced, but merely reasonable force after entry. But Tindal, C.J., in *Anthony v. Haney* (*n*), cites the following passage from Blackstone (*o*) with approval.

“ As the public peace is a superior consideration to any
 “ one man’s private property, and as, if individuals were
 “ once allowed to use private force as a remedy for
 “ private injuries, all social justice must cease, the strong
 “ would give law to the weak and every man would
 “ revert to a state of nature, for these reasons it is pro-
 “ vided that this natural right of recaption shall never
 “ be exerted where such exertion must occasion strife and
 “ bodily contention or endanger the peace of society.
 “ If, for instance, my horse is taken away, and I find

(*i*) *R. v. Blake* (1765), 3 Burr. 1731; 15 Digest 651, 6961; *R. v. Wilson* (1799), 8 Term Rep. 357; 15 Digest 650, 6955.

(*j*) Com. Dig. Tit. Forcible Entry, 1 Hawk., C. 64.

(*k*) *Hemmings v. Stoke Poges Golf Club* (*supra*).

(*l*) *Blades v. Higgs* (1861), 10 C.B. N.S. 713; 15 Digest 831, 9116; *Anthony v. Haney* (1832), 8 Bing. 186; 43 Digest 412, 350; *Patrick v. Colerick* (1838), 3 M. & W., 483; 43 Digest 412, 352; *Dixon v. Hewetson* (1867), 16 L.T. 295, N. P.; 43 Digest 412, 354; *Fletcher v. Marillier* (1839), 9 Ad. & El. 457; 43 Digest 412, 355; *Rea v. Sheward* (1837), 2 M. & W. 424; 43 Digest 412, 358; *Webb v. Beavan* (1844), 6 Man. & G. 1055; 43 Digest 412, 357.

(*m*) *Patrick v. Colerick* (*supra*) where Parke, B., says at p. 485, “ All the old authorities say that where a party places the goods upon his own close, he gives to the owner of them an implied licence to enter for the purpose of recaption.”

(*n*) (*supra*).

(*o*) 3 Comm. 4.

" him in a common or fair or a public inn, I may lawfully
 " seize him to my own use ; but I cannot justify breaking
 " open a private stable or entering on the grounds of a
 " third person to take him, *except he be feloniously stolen* ;
 " but must have recourse to an action at law."

This passage would appear to justify a forcible entry where the goods have been stolen and in no other case, and if this is the state of the law it would cover, presumably, goods which a hirer has stolen as a bailee, but there appears to be no decided case, and in view of the attitude adopted generally by the Courts towards persons who forcibly take the law into their own hands, it would be in the majority of cases a most unwise course to adopt (*p*).

A person having entered peaceably under the licence does not become a trespasser *ab initio* if he exceeds what is reasonable in the use of force after he has entered, and is in this respect in a different position to one whose right of entry is given by the law (*q*).

It cannot be too strongly emphasised that any licence to enter and seize goods contained in a hire-purchase agreement to which the Hire-Purchase Act, 1938, applies, is void if the agreement be made on or after 1st January, 1939 (*r*), and it cannot be acted upon even in agreements made before that date after one-third of the hire-purchase price has been paid or tendered (*s*).

(D) TO ASSIGN THE GOODS AND INTERESTS

Assignment.—The owner has a right to assign his interests under a contract of hiring or hire-purchase (*t*)

(*p*) For a statement of the attitude of the law towards forcible assertions of right, see *Miller v. Strohmenger* (1887), 4 T.L.R. 133 ; 3 Digest 98, 266.

(*q*) *Six Carpenters' Case* (*Vaux v. Newman*), (1611) 8 Coke Rep. 146 ; 43 Digest 393, 165 ; *Hemmings v. Stoke Poges Golf Club*, (*supra*).

(*r*) Hire-Purchase Act, 1938, s. 5 ; *post*, p. 283.

(*s*) *Ibid.*, s. 11 ; *post*, p. 291.

(*t*) *In re Davis & Co., Ex parte Rawlings* (1888), 22 Q.B.D. 193 ; 3 Digest 96, 260 ; *In re Isaacson, Ex parte Mason*, [1895] 1 Q.B. 333 ; 3 Digest 97, 267.

(except the licence to enter and seize which is not assignable) or his property in the goods or both. This subject is dealt with in detail in Chapter 3.

(E) SPECIAL RIGHTS UNDER HIRE-PURCHASE ACT, 1938

Although the main purpose of the Hire-Purchase Act, 1938, was the protection of the poor hirer from unscrupulous traders, the hire-purchase trade has received certain advantages under its provisions. These will be referred to in the appropriate chapters, but it may be well to refer to such rights against the hirer as have been created or clarified by the Act, in relation to those hire-purchase agreements to which the Act applies.

(1) A right to damages where the hirer has failed to take reasonable care of goods (s. 4 (2)). This has already been referred to.

(2) Where the hirer has himself determined the agreement but retains possession of the goods, a right to an order from the Court against the hirer for specific delivery of the chattels (s. 4 (3)).

(3) A right to receive information from the hirer as to the whereabouts of the goods, in cases where the hirer is under a duty to keep the goods in his possession or control (s. 7 (1)). A hirer is liable to a fine not exceeding £10 for failing to comply with a request for this information (s. 7 (2)).

(4) The benefit of a presumption against the hirer that the hirer's possession of goods is adverse to the owner, where in an action to recover possession of goods from the hirer, the owner proves that before the action and after his right to possession accrued he made a request in writing to the hirer to surrender the goods (s. 10).

(5) Certain rights in relation to installation charges. These, however, are hardly additional rights. They are necessary to prevent the Act creating injustice towards the owner (s. 19 and s. 20 (2)).

SECTION 3—HIRER'S DUTIES AND LIABILITIES

(A) DUTY TO TAKE CARE OF THE GOODS

Ordinary and Reasonable Care.—In the absence of a special contract defining the duty (*u*), it is the duty of the hirer to take ordinary and reasonable care of the goods (*v*). The degree of care necessary is that which a prudent man employs in keeping his own goods (*w*). It is only for want of due care, therefore, that the hirer can be made liable (*x*). The duty to take care is the same for all classes of bailees for hire, whether the reward

(*u*) See *Crane v. Galway* (1905), 39 I.L.T. 94 ; 3 Digest 98, *h*, where a hirer was held liable for loss by fire although he had asked the owner to remove the goods prior to the fire.

(*v*) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909 ; 3 Digest 89, 219, *per* Lord Holt, at p. 916 : “. . . if goods are let out for reward, the hirer is bound to use the utmost diligence, such as the most diligent father of a family uses ; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.”

Sir William Jones, in his work on Bailments, does not agree with the use of the word “utmost” in the passage quoted above from Lord Holt’s judgment, and proves indisputably, by tracing the doctrine back to Roman Law, that a phrase, which ought to have been translated “ordinarily diligent,” has been supposed to mean “extremely careful.” *Vide* Smith’s Leading Cases, where the matter is discussed in the text under the heading *Locatio rei*, in the leading case of *Coggs v. Bernard*.

(*w*) If the hirer of a horse imprudently treats the animal when it is sick, instead of calling in some one who could give it proper attention, and as a result it dies, he is responsible for the loss of the horse, because a prudent man would not do such a thing towards his own horse (*Dean v. Keate* (1811), 3 Camp. 4 ; 2 Digest 256, 370). If the hirer of a horse ride it when it is in an exhausted condition, and thus injure it, he is liable (*Bray v. Mayne* (1818), Gow, 1 ; 3 Digest 89, 220).

(*x*) *Tilling v. Balmain* (1892), 8 T.L.R. 517 ; 3 Digest 89, 227. In this case a hirer of a stage horse was held in the County Court not liable for injuries to the horse caused by its falling through a defective floor, there being no evidence that the injuries were due to any want of care on his part. The County Court Judge was of the opinion that as an ordinary bailee for hire he was bound to take ordinary care of the horse—such care as a prudent man would have exercised as to his own property—and this statement of the law was affirmed in the Divisional Court by Pollock, B., and Williams, J.

passes from the bailor to the bailee (*e.g.*, the horse owner who stables his horses and carriages with a job master) or from the bailee to the bailor (*e.g.*, the hire of furniture for use) (*y*). The hirer is not responsible for damage caused to the goods through fair wear and tear (*z*).

Hire-Purchase Act, 1938.—It is provided by section 4 (2) of the above Act that where a hire-purchase agreement to which the Act applies has been determined by the hirer under the provisions of section 4 (1), *i.e.* by giving notice in writing to any person entitled or authorised to receive the sum payable under the agreement, the hirer shall, if he has failed to take reasonable care of the goods, be liable to pay damages for the failure. This section only applies in the case of hire-purchase agreements made after 1st January, 1939.

Use only for Purpose hired.—It is the duty of the hirer to use the goods only for the purpose for which they are hired, and if he uses them for another purpose and injures them, it is an actionable wrong independent of the contract and the plea of infancy is of no avail (*a*).

Responsibility for Acts of Servant.—The hirer's duty to take care of the goods makes him responsible for the negligence of his servant when acting within the scope of his authority. If the hired goods are injured through

(*y*) *Mackenzie v. Cox* (1840), 9 C. & P. 632; 3 Digest 74, 141; *Phipps v. New Claridge's Hotel, Limited* (1905), 22 T.L.R. 49; 3 Digest 74, 142. See also *Searle v. Laverick* (1874), L.R. 9 Q.B. 122; 3 Digest 73, 136, where a livery stable keeper, taking care of the carriage of a customer, was held not liable for injuries to the carriage due to the carelessness of the builder who put up the coachhouse.

(*z*) *Pomfret v. Ricroft*, 1 Saund. 321, *per* Hale, at p. 323b; 3 Digest 70, 118; *Blakemore v. Bristol & Exeter Rail Co.* (1858), 8 E. & B. 1035; 3 Digest 70, 115. These were both cases of gratuitous loan, but it is submitted that the same principles apply.

(*a*) *Burnard v. Haggis* (1863), 14 C.B. N.S. 45; 3 Digest 56, 20, where the hirer of a mare for riding along a road wrongfully put her at a fence, and she fell on a stake, and was so injured that she died, was held liable for the wrong, notwithstanding that he was an infant and could not have been held liable on the contract unless there was evidence that the horse was a necessary. And see *Walley v. Holt* (1876), 35 L.T. 631; 3 Digest 56, 27.

the negligence of the servant while so acting, the hirer will be liable (b).

Onus of Proof.—If the goods have been damaged during the hiring period, the onus is upon the hirer to show that he used ordinary care regarding the goods. The plaintiff must adduce reasonable evidence of negligence but, if the goods were solely under the management of the hirer and an accident such as in the ordinary course of things does not happen to such goods if proper care is used, occurs and is proved, there is, in the absence of explanation by the hirer, sufficient evidence that the accident arose from want of care (c). In some cases it may be enough merely to prove the accident; in others it will not be sufficient; a ship going down in the sea is as consistent with care as with negligence, but a ship going down in the dock is *prima facie* evidence of negligence (d). There must be reasonable evidence of negligence; but upon reasonable evidence of negligence being adduced, the onus is upon the hirer to prove that reasonable care

(b) *Sanderson v. Collins*, (1904) 1 K.B. 628; 3 Digest 91, 233, where it was held that a hirer whose coachman had taken a carriage out for his own purpose and not for the purpose of his master was not liable for an injury done to the carriage through the coachman's negligence. The decision in *Coupé Co. v. Maddick*, [1891] 2 Q.B. 413; 3 Digest 91, 232, was considered and distinguished. In that case the hirer's coachman was driving a hired carriage by the authority of his master, but drove in another direction for purposes of his own, and it was held that for an injury to the carriage through the coachman's negligence the hirer was responsible. The distinction is a very slight one, and Collins, M.R., and Romer, L.J., in *Sanderson v. Collins* said that the decision in *Coupé Co. v. Maddick* could only be supported by taking the view that the servant was acting within the scope of his employment at the time of the accident. And see *Cheshire v. Bailey*, [1905] 1 K.B. 237; 3 Digest 88, 278; *Mintz v. Silverton* (1920), 36 T.L.R. 399; 3 Digest 133, 1016.

(c) *Scott v. London Dock Co.* (1865), 3 H. & C. 596; 36 Digest 91, 601; *Mackenzie v. Cox* (1840), 9 C. & P. 632; 3 Digest 74, 141; *Phipps v. New Claridge's Hotel, Limited* (1905), 22 T.L.R. 49; 3 Digest 74, 142; *Morison, Pollexfen & Blair v. Walton* (1909), cited [1915] 1 K.B. 90 H.L.; 3 Digest 74, 143; *Travers (Joseph) & Sons, Limited v. Cooper*, [1915] 1 K.B. 73; 3 Digest 75, 144; *Bullen v. Swan Electric Engraving Co.* (1907), 23 T.L.R. 258, C.A.; 3 Digest 63, 67; *Wiehe v. Dennis Bros.* (1913), 29 T.L.R. 250; 3 Digest 63, 68; *Coldman v. Hill*, [1919] 1 K.B. 443; Digest Supp.

(d) *Scott v. London Dock Co.* (*supra*), *per* Blackburn, J., at p. 599.

has been exercised (*e*) ; if he does this, it is not for him to show how or when the accident or damage occurred (*f*).

(B) DUTY TO DELIVER UP IN GOOD CONDITION, AND AT THE PROPER TIME

Return in Good Condition, and Punctually.—The hirer must deliver up the goods in a condition as good as that in which he received them, fair wear and tear excepted (*g*). Where the terms of the contract are that the goods must be delivered up “in good working order,” the condition of the goods at the commencement of the period of hiring must be taken into consideration (*h*). The hirer must also return the goods at the time agreed upon (*i*).

Impossibility.—In the absence of a special contract, the hirer is excused from returning the goods if their re-delivery becomes impossible and such impossibility arises from a cause which is not the fault of the hirer, *e.g.*, from robbery with violence, theft without negligence or accidental fire (*j*), or if they are in the custody of the law (*k*), or if some one with a right superior to that of the person from whom they are hired has claimed them and the hirer has given them up (*l*). On the last point a bailee cannot be in any better position than his bailor, and if the bailor

(*e*) *Dollar v. Greenfield* (1905), *The Times*, May 19 ; 3 Digest 89, 223.

(*f*) *Bullen v. Swan Electric Engraving Co.* (*supra*).

(*g*) *Dollar v. Greenfield* (*supra*) ; *Pomfret v. Ricroft*, (1671) 1 Saund. 321 ; 3 Digest 70, 118.

(*h*) *Schroder v. Ward* (1863), 13 C.B. N.S. 410 ; 3 Digest 92, 237.

(*i*) *Mills v. Graham* (1804), 1 B. & P. N.R. 140, *per* Mansfield, C.J. at p. 145 ; 3 Digest 99, 275.

(*j*) *Taylor v. Caldwell* (1863), 3 B. & S. 826, *per* Blackburn, J., at p. 838 ; 3 Digest 100, 278 ; *Coggs v. Bernard*, *supra* ; *Longman v. Gallini* (1790), cited in *Abbot's Merchant Shipping*, 14th Ed., at p. 600 ; 3 Digest 90, 228 ; *Cooper v. Barton* (1810), 3 Camp. 5 n., N.P. ; 3 Digest 89, 222 ; *Sanderson v. Collins*, *supra* ; *Cheshire v. Bailey*, *supra*. See also the subject of inevitable accident, Section 5, p. 98, *post*.

(*k*) *Verrall v. Robinson* (1835), 2 Cr. M. & R. 495 ; 1 Digest 59, 483 ; *Pillot v. Wilkinson* (1864), 34 L.J. Ex. 22 ; 3 Digest 102, 293.

(*l*) *Wilson v. Anderton* (1830), 1 B. & Ad. 450 ; 3 Digest 115, 385.

has no title, the bailee can have none (*m*). In the absence of special provision in the agreement, it is no part of the hirer's duty to take the goods to the owner, but they must be available for return to the owner at the hirer's address. It is for the owner to come and get them (*n*).

(C) DUTY TO PAY THE RENT

Simple Hire.—It is the duty of the hirer of goods to pay the rent at the time and place mentioned in the agreement. The whole rent for the entire period of the hiring is due to the owner, if the hiring has been for a definite period and the hirer returns the goods before the expiration of that period (*o*). If, however, the owner receives the goods back before the expiration of the term and accepts them as a termination of the hiring or does anything which indicates a rescission of the contract (*e.g.*, sells the goods or hires them out to another), then he will not be entitled to the payment of the whole of the rent (*p*).

Hire-Purchase.—The same general principles apply to hire-purchase agreements (except those to which the Hire-Purchase Act, 1938, applies, which will be dealt with in the next paragraph), but the whole question of payment of rent is as a rule dealt with in detail in a hire-purchase agreement, in particular the amount to be paid by the hirer in addition to the accrued rent, if he returns the goods before the conclusion of the hiring. This payment is sometimes referred to in the agreement as being by way of compensation for depreciation of the goods. It has been held that such a clause does not amount to the

(*m*) *Wilson v. Robinson*, (1830), *per* Tenterden, C.J., at p. 456.

(*n*) *Elsey & Co., Limited v. Hyde*, unreported except in Jones and Proudfoot's *Notes on Hire-Purchase Law*, p. 28 and p. 68.

(*o*) *Wright v. Melville* (1828), 3 C. & P. 542; 3 Digest 92, 239.

(*p*) *Ibid.* See text under heading "Owner's Rights," p. 74, *ante*.

imposition of a penalty (*q*). As to the hirer's duty to pay punctually, see *ante*, under heading Owner's Rights, p. 72.

Hire-Purchase Act, 1938.—The question of the sum payable by the hirer on the determination by him of a hire-purchase agreement to which this Act applies is dealt with in section 4, subsection (1), of the Act, which is printed in Appendix A (*post*, p. 281). It will be observed that the sum is limited to such sum (if any) by which one-half of the hire-purchase price (*i.e.*, the total sum payable by the hirer under such a hire-purchase agreement, in order to complete the purchase of the goods to which the agreement relates), exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement (*r*), exceeds the total of the sums paid and the sums due in respect of the hire-purchase price. This proviso cannot be excluded, nor can any additional liability be imposed, by the terms of the agreement. Further, the fact that the hirer's liability is so limited, must be brought to his attention by the Notice which is made a compulsory part of all such agreements (*s*),—or it is more correct, perhaps, to say that such agreements cannot be enforced unless such a notice is included. This requirement may, however, be dispensed with by the Court (*t*). The Act further provides that any provision in such an agreement whereby a hirer, after the determination of the hire-purchase agreement or the bailment *in any manner whatsoever*, is subject to a liability which exceeds that which he would incur if he determined it himself under the Act, is void (*u*). Further, by section 9, the Act makes

(*q*) *Associated Distributors, Ltd. v. Hall & Hall*, [1938] 1 All E.R. 511. See also *Elsey & Co., Ltd. v. Hyde*; *Chester & Cole, Ltd. v. Wright*; *Roadways Transport Development Co. v. Browne & Gray* (1927), reported in Jones and Proudfoot's *Notes on Hire-Purchase Law* (2nd Ed.).

(*r*) *Hire-Purchase Act*, 1938, s. 21 (1); *post*, p. 307.

(*s*) *Ibid.*, s. 2 (2) (c) and Schedule; *post*, pp. 277 and 310.

(*t*) *Ibid.*, Proviso to s. 2 (2); *post*, p. 277.

(*u*) *Ibid.*, s. 5 (c); *post*, p. 283.

provision for the appropriation of payments made by a hirer who is liable to make payments in respect of two or more hire-purchase agreements. In making any payment which is not sufficient to discharge the total amount then due under all the agreements, the hirer shall be entitled to appropriate the sum to any one or two or more of the agreements in such proportions as he thinks fit. If he fails to appropriate, the payment is to be appropriated towards the satisfaction of the sums due under the various agreements in the proportions which those sums bear to one another.

(D) LIABILITY FOR NEGLIGENCE

Simple Hire and Hire-Purchase.—The hirer is liable in damages for the acts of himself or his servants when acting within the scope of their employment, whereby the negligent user of the hired goods causes damage to third persons (*v*). If the hirer's coachman, driving the hired carriage negligently, runs over a person, the hirer is responsible to that person for the coachman's negligence. But if the hirer lends the hired goods to another, and as a result of that other's negligence some person is injured, the hirer is not responsible, because there is no relationship of agency between the wrongdoer and the hirer (*w*).

Joint Hiring.—In the case of a joint hiring (*e.g.*, by partners), if one of the joint hirers makes such negligent use of the goods that he injures a third person, the joint hirer who was negligent will alone be liable to the injured person, while both joint hirers will be responsible to the owner for the injury to the goods (*w*).

(*v*) *Sanderson v. Collins*, [1904] 1 K.B. 628 C.A.; 3 Digest 91, 233, and see *Storey v. Ashton* (1869), L.R. 4 Q.B. 476; 34 Digest 140, 1093; *Coupé Co. v. Maddick*, [1891] 2 Q.B. 413; 34 Digest 140, 1094; see also *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 34 Digest 129, 991. On the question of scope of employment see *Limpus v. L. G. O. C.* (1862), 1 H. & C. 526; 34 Digest 129, 989; *Beard v. Same*, [1900] 2 Q.B. 530; 34 Digest 142, 1113.

(*w*) Dictum of Cave, J., in *Coupé v. Maddick*, [1891] 2 Q.B. 413, at p. 415; 34 Digest 140, 1094.

SECTION 4—HIRER'S RIGHTS

(A) TO DETERMINE THE CONTRACT BY RETURNING THE GOODS

Return of the Goods.—Where the hiring is a simple hiring for an indefinite time, the hirer has a right to determine the hiring by returning the goods. Even in a hire-purchase agreement which is in form for an indefinite time, without any express obligation to pay a fixed number of instalments, although no express power to determine is given by the agreement, it is submitted that such power is implied. In the ordinary modern hire-purchase agreement express power is given to the hirer to determine the hiring at any time by returning the goods (*x*). This power is at times restricted in a variety of ways, *e.g.*, by imposing an obligation to pay an additional sum, if the termination is effected within a certain time. This latter clause has been held not to amount to the imposition of a penalty (*y*). In the absence of the power to determine, an agreement may, *e.g.*, where the total of the instalments equals the price of the goods, be held to be an agreement to buy and not to hire (*z*), with serious consequences on account of the operation of the Factors Act, 1889, and the Sale of Goods Act, 1893. This subject is discussed on p. 154 and the following pages.

It is expressly provided in the Hire-Purchase Act, 1938, section 4, that the hirer is entitled, at any time before the final payment under a hire-purchase agreement to which the Act applies falls due, to determine the agreement by notice in writing (*a*).

(*x*) See *Helby v. Matthews*, [1895] A.C. 471 ; 3 Digest 93, 245.

(*y*) *Associated Distributors, Ltd. v. Hall & Hall*, [1938] 1 All E.R. 511 ; *Elsey & Co., Limited v. Hyde* ; *Chester & Cole, Limited v. Wright* ; *Roadways Transport Development, Ltd. v. Browne & Gray* (1927). These cases are only reported in Jones and Proudfoot's *Notes on Hire-Purchase Law* (2nd Ed.).

(*z*) *Lee v. Butler*, [1893] 2 Q.B. 318 ; 3 Digest 92, 241.

(*a*) Hire-Purchase Act, 1938, s. 4 ; *post*, p. 281.

(B) TO SUE FOR CONVERSION, LOSS OR INJURY

Conversion, Loss, Injury.—If during the hiring period the hirer is wrongfully deprived of the possession of the goods by a third person, or they are injured or lost through the negligence of a third person, then the hirer has a right to sue such person (b). In an action against a stranger for loss of goods caused by his negligence, the bailee in possession (e.g., a hirer) can recover the value of the goods, though he would have a good answer to an action by the bailor for damages for the loss of the thing bailed (c).

Hirer with Possession has Property.—As between the possessor and the wrongdoer, the presumption of law is that the person who has possession has the property (d). The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore, its loss or deterioration is his loss, and to him, if he demands it, it must be recouped (e). The hirer receiving damages under such circumstances will only be allowed to retain what he is entitled to, to compensate him for his own particular loss, and all above that he must hand over to the owner (f), for the wrongdoer, having once paid full damages to the hirer, has an answer to any action by the owner (g).

(b) *Croft v. Alison* (1821), 4 Barn. & Ald. 590 ; 34 Digest 143, 1722 ; *Burton v. Hughes* (1824), 2 Bing. 173 ; 3 Digest 113, 367 ; *Raynor v. Childs* (1862), 2 F. & F. 775 ; 3 Digest 114, 378. See also Story on Bailments, s. 394 : " By the Common Law, in virtue of the bailment, the hirer acquires a special property in the thing during the continuance of the contract, and for the purposes expressed or implied by it. Hence he may maintain an action for any tortious dispossession of it, or any injury to it, during the existence of his right."

(c) *The Winkfield*, [1902] P. 42, per Collins, M.R., at p. 54 (3 Digest 113, 373), overruling *Claridge v. South Staffordshire Tramway Co.* [1892] 1 Q.B. 422 ; 3 Digest 114, 374.

(d) *Jeffries v. G.W.R. Co.* (1856), 5 E. & B. 802, per Lord Campbell, at p. 806 ; 3 Digest 64, 76.

(e) *The Winkfield* (supra), per Collins, M.R., at p. 60.

(f) *Ibid.*, at p. 61.

(g) *Ibid.*

(C) TO THE USE OF THE GOODS DURING THE HIRING PERIOD

Simple Hire and Hire-Purchase.—The hirer has an exclusive right to the use of the goods during the hiring period, and the owner must not disturb him; and if there is a redelivery to the owner for a temporary purpose (*e.g.*, for repair), the hirer has a right to have the goods back as soon as is reasonably possible (*h*), and on refusal of the owner to return it, the hirer may maintain an action of trover against him (*i*).

Hire-Purchase Act, 1938.—By the above Act it is expressly provided that in every hire-purchase agreement to which the Act applies there shall be an implied warranty that the hirer shall have and enjoy quiet possession of the goods (*j*). It is impossible for the parties to contract out of this provision (*k*).

(D) TO ASSIGN HIS RIGHTS UNDER THE AGREEMENT IN CERTAIN CASES

This is dealt with in detail in Chapter 4.

(E) SPECIAL RIGHTS GIVEN BY THE HIRE-PURCHASE ACT, 1938

It may be well to summarise here the rights obtained by the hirer under hire-purchase agreements to which the above Act applies. They will be dealt with in detail in the appropriate places in the text.

(1) A right to be informed of the cash price (*i.e.*, the price at which the goods may be purchased for cash) before entering into the hire-purchase agreement (s. 2 (1)).

(*h*) Story on Bailments, s. 395.

(*i*) *Roberts v. Wyatt* (1810), 2 Taunt. 268; 3 Digest 108, 330. Apparently the measure of damages would be the value of hirer's interest in the chattel. *Vide Chinery v. Viall* (1860), 5 H. & N. 288; 3 Digest 113, 371; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K.B. 244; 3 Digest 93, 247.

(*j*) Hire-Purchase Act, 1938, s. 8 (1) (a); *post*, p. 287.

(*k*) *Ibid.*, s. 8 (3); *post*, p. 288.

(2) A right to an agreement signed by all the parties and containing certain specific information and to receive a copy. The information to include a statement of the maximum sum the hirer can be called upon to pay upon the determination of the agreement (s. 2 and s. 5 (b) and (c)).

(3) A right to determine the agreement at any time before the final payment falls due (s. 4).

(4) Protection against persons having the right under the agreement to enter his premises to seize the goods (s. 5 (a)).

(5) Protection from any clause whereby agents of the owner are deemed to be the hirer's agents (s. 5 (d)).

(6) Protection against the insertion of any clause in the agreement whereby the owner is relieved from the acts or defaults of any person acting on his behalf in connection with the formation of the agreement (s. 5 (e)).

(7) A right to receive under certain conditions a copy of the agreement and information as to the state of his account (s. 6).

(8) A right to have certain warranties and conditions implied in the agreement (s. 8).

(9) A right to appropriate payments in a certain way (s. 9). See *ante*, p. 93.

(10) Restriction of the owner's right to recover possession otherwise than by action where one-third of the hire-purchase price has been paid or tendered (s. 11 (1)). See *ante*, p. 78.

(11) Certain rights to recover from the owner payments already made, where the owner acts in disregard of the foregoing subsection (s. 11 (2)).

(12) Protection from multiplicity of actions, once an owner has commenced an action to recover possession of goods (ss. 12 and 13).

(13) The hirer has also obtained the advantage (it cannot be called a right as it is a matter for the exercise of the discretion of the Court) that the Court may, in any

action by an owner under s. 11 (above) to recover possession of the goods, make an order transferring the title to a part of the goods to the hirer under certain circumstances. Certain other advantages in connection with such an action are also obtained, but it is not proposed to deal with them in detail here (s. 12).

(14) In cases of successive hire-purchase agreements comprising the same goods, the right to the benefit of sections 11 and 12 of the Act from the commencement of the subsequent agreement, if one-third of the hire-purchase price has been paid or tendered in respect of the previous hire-purchase agreement when the subsequent one is entered into.

SECTION 5—ACT OF GOD, “VIS MAJOR,” INEVITABLE ACCIDENT, ROBBERY

Destruction or Robbery of Goods.—Questions sometimes arise as to the position of the owner and of the hirer where, during the hiring period, the goods hired are destroyed by act of God, *vis major*, or inevitable accident, or are stolen and the robbery is not due to any negligence on the part of the hirer. The term “Act of God” means something overwhelming, something extraordinary, something which could not reasonably be anticipated, something occasioned by the elementary forces of nature (*l*). “*Vis major*” means irresistible violence (*m*). “Inevitable accident” means accident without fault (*n*). Where during the hiring period an act of God, or *vis major*, such as a storm, or lightning, or high wind, or inevitable

(*l*) *Forward v. Pittard* (1785), 1 T.R. 27; 42 Digest 993, 208; *Oakley v. Portsmouth & Ryde Steam Packet Co.* (1856), 11 Ex. 618; 8 Digest 21, 113; *Nichols v. Marsland* (1875), L.R. 10 Ex. 255; (1876), 2 Ex. Div. 1; 36 Digest 197, 376; *Nugent v. Smith* (1876), 1 C.P.D. 423; 8 Digest 18, 88; *Nitro-phosphate, etc., Manure Co. v. London & St. Katherine Docks Co.* (1878), 9 Ch. D. 503; 3 Digest 101, 671.

(*m*) *Walker v. British Guarantee Association* (1852), 18 Q.B. 277, per Lord Campbell, C.J., at p. 286; 3 Digest 91, 230.

(*n*) *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115, per Willes, J., p. 121; 12 Digest 372, 3094.

accident, destroys or damages the goods hired, in the absence of a special contract (o) the hirer is released from liability (p).

These principles would apply with equal force to cases of simple hire and hire-purchase. As regards credit-sales under the Hire-Purchase Act, 1938, the principles applicable in cases of Sale of Goods would apply.

Insurance.—It is no part of the duty of the hirer, in the absence of a special contract to do so, to insure the goods hired against risks like fire (q), but if it is a term of the agreement that the hirer shall insure the goods in the joint names of the owner and the hirer, it is not a compliance with the agreement to insure in the name of the hirer only (r). If a hirer, though not bound by contract so to do, does insure the hired chattels, he has an insurable interest in the chattels so as to enable him to recover from the insurers the full value of them (s). In most cases of bailment a bailee who recovers insurance money is in the position of a trustee to the owner of the chattel

(o) *Paradine v. Jane* (1648), Aleyn, 26; 12 Digest 371, 3088.

(p) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909, at p. 918; 3 Digest 72, 133; *Taylor v. Caldwell* (1863), 3 B. & S. 826, *per* Blackburn, J., at p. 83; 3 Digest 90, 226; *Walker v. British Guarantee Association*, *supra*.

See also Story on Bailments, s. 25:—" . . . bailees in general are not responsible for losses resulting from inevitable accident, or from irresistible force, although they may become so liable by special contract. . . . By inevitable accident, commonly called the Act of God, is meant an accident produced by any physical cause, which is irresistible; such as a loss by lightning or storm by the perils of the seas, by an inundation or earthquake, or by sudden death or illness. By irresistible force is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army or, as the phrase commonly is, by the King's enemies; that is by public enemies. . . ." S. 26: "Robbery by force is also deemed irresistible. Robbery (*rapina*) is in the civil law defined to be the violent taking from the person of another of money or goods for the sake of gain . . . and, whether such robbery be by robbers on the highway, or by breaking open a house and assaulting the inmates makes no difference."

(q) *Viviers v. Jute & Co.* (1912), S.C. 222 (South Africa); 3 Digest 105, s.

(r) *Doe v. Gladwin* (1845), 6 Q.B. 953; 31 Digest 503, 6500.

(s) *Waters v. Monarch Fire & Life Assurance Co.* (1856), 5 E. & B. 870; 3 Digest 106, 372. (This was not a hire-purchase case, but one of deposit with warehousemen.)

and must account to the owner (*t*), but in the case of hire-purchase the element of sale is introduced (*u*), and it is submitted that in equity the insurance money should be divided proportionately to the interests of the owner and hirer. This matter is in fact as a rule dealt with in the hire-purchase agreement.

(*t*) *Sidaways v. Todd* (1818), 2 Stark. 400 ; 3 Digest 105, 311.

(*u*) *Karflex, Ltd. v. Poole*, [1933] 2 K.B. 251, *per* Goddard, J., at p. 263 ; Digest Supp.

CHAPTER 3

ASSIGNMENT

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SECTION 1—ASSIGNMENT GENERALLY

THE question of assignment of the benefit of a hire-purchase agreement and of the goods comprised in it, forms one of the most difficult problems confronting the practitioner in connection with hire-purchase law, and it will be as well to discuss shortly some elementary principles before dealing with the special problems.

The only kind of property which can be made the subject of a hire-purchase agreement such as is being considered in this book, *i.e.*, an agreement which comes within the branch of the contract of bailment known as *locatio conductio rei*, is personal chattels in possession, sometimes called corporeal chattels, that is, things that are tangible, visible and movable, and of which actual physical possession can be taken.

Rights of Ownership. Possession.—There are a great many rights which go to make up the sum of rights comprising ownership of corporeal chattels, of which possession is only one, if the most important (a), and

(a) *Wilbraham v. Snow* (1670), 2 Wms. Saund. 47; 21 Digest 507, 828; *Jones v. Williams* (1837), 2 M. & W. 326, 331; 43 Digest 385, 115; *The Winkfield*, [1902] P. 42, C.A.; 3 Digest 113, 373; *Rogers v. Spence* (1844), 13 M. & W. 571; 5 Digest 972, 7964.

possession is by no means a necessary incident of ownership of them (b). In fact the contract of bailment consists in the bailor parting with the possession of the chattels to the bailee, on a variety of terms, but on a trust, that when the bailment is at an end, possession will be restored to the bailor, the bailor, meanwhile, remaining the owner of the chattel. The usual method of transferring possession is by manual delivery, but this is not necessary, if it is the intention of the parties that possession shall be given, and there is also *physical ability* on the part of the transferee to exercise exclusive control (c).

Meaning of Possession.—It must be borne in mind that possession may mean either *de facto* possession, *i.e.*, actual physical possession, or *de jure* possession, *i.e.*, legal possession, that is a right to possession which may or may not be accompanied by actual physical control.

Transfer of Ownership.—There are a number of ways in which the ownership of corporeal chattels as distinct from possession of them may be transferred or parted with.

By delivery of Possession.—(a) By mere delivery of possession, if it is the intent thereby to transfer the ownership, and this delivery may be made by handing over a key, or document of title if the physical control is effected thereby (d), or by a change in the character of the possession, *e.g.*, where a vendor retains possession as bailee for the purchaser (e). This method can necessarily only be applied when the owner has possession.

(b) *Bloxam v. Sanders* (1825), 4 B. & C. 941; 39 Digest 640, 2364.

(c) *Pollock & Wright*, Possession in the Common Law, p. 79.

(d) *Ellis v. Hunt* (1789), 3 Term Rep. 464, 468; 39 Digest 618, 2167; *Bowker v. Williamson* (1889), 5 T.L.R. 382; 7 Digest 20, 92.

(e) *Elmore v. Stone* (1809), 1 Taunt. 458; 39 Digest 379, 175. *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K.B. 305; Digest Supp. In this case an owner, H., sold a lorry to a finance company who then let it back to him under a hire-purchase agreement. The lorry never left the possession of H. It was held that after the hire-purchase agreement H. held as a bailee, and was not in possession either as a mercantile agent or as a person who "having sold goods continues or is in possession of the goods" within the meaning of the Sale of Goods Act, 1893, s. 25; *post*, p. 339.

By Deed.—(b) By Deed, with or without delivery and with or without consideration. But if delivery of possession is not given this may be a bill of sale (*i.e.*, if it does not come within the exceptions to the definition contained in section 4 of the Bills of Sale Act, 1878 (*f*) and according as it is absolute or given as security for an advance it is subject to the requirements of the Bills of Sale Act, 1878, and/or the Bills of Sale Act (1878) Amendment Act, 1882. This has been dealt with in Chapter 1.

By Sale.—(c) By sale or agreement to sell.

This is the most usual method of assigning the property in goods the consideration being the price. The property in the goods will pass according to the intention of the parties (*g*). The contract may be verbal or in writing, absolute or conditional. If, however, the contract for sale is for goods of the value of £10 or upwards, section 4 of the Sale of Goods Act (*h*) applies, and unless the contract is in writing signed by the party to be charged or his agent, there must be an actual delivery of part of the goods or payment of part of the price, for the contract to be enforceable. And under the Hire-Purchase Act, 1938, any credit-sale agreement under which the total purchase price exceeds five pounds, is unenforceable, unless it is in writing to the extent provided by section 3.

If the contract is in writing and possession is not given, then the same remarks apply as to the Bills of Sale Acts as in (b) (above).

(d) Corporeal chattels may also be alienated by a variety of ways which do not arise in connection with the subject matter of this section of this book, or only indirectly, *e.g.*, by exchange, distress, execution, bankruptcy or death.

Choses in Action.—There are, in addition to personal chattels in possession, other kinds of personal property of

(*f*) 2 Halsbury's Statutes 85.

(*g*) Sale of Goods Act, 1893, s. 17; *post*, p. 336.

(*h*) Appendix D; *post*, p. 332.

which the owner has not the present use and enjoyment, but merely the bare right of ownership, *e.g.*, rights of contract. These are known as choses in action and the expression is applied to personal rights of property which can only be enforced by action and not by taking physical possession (*i*). Choses in action are classified in a variety of ways, but we are mainly concerned here with legal choses in action, *i.e.*, those which are recoverable by action at law, *e.g.*, a debt, a claim for damages or a right of action arising under contract (*j*).

When an owner lets chattels under a hire-purchase agreement and the goods are actually delivered, several changes take place. The owner parts with several of the items which go to make up the totality of ownership, *e.g.*, possession, use, and right to destroy or alter, and the hirer obtains a qualified property, *e.g.*, the right to possession and use. The owner retains the residuum of ownership (*k*) but it is not a full ownership unless and until the hirer does something to bring the bailment to an end or to entitle the owner to recover possession. This right to recover possession exists quite independently of the hire-purchase agreement, and remains after the latter has been completely avoided (*l*), although during the continuance of the agreement the right is, of course, governed by the agreement.

A hire-purchase agreement, however, usually does more than determine the exact proportions of rights of possession and property in the chattels that shall be enjoyed by the bailor and bailee respectively; it usually creates a number of rights and liabilities which do not directly

(*i*) *Torkington v. Magee*, [1902] 2 K.B. 427, 430; 8 Digest 430, 81; *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426, 440; 8 Digest 421, 1.

(*j*) *Brice v. Bannister* (1878), 3 Q.B.D. 569, C.A.; 8 Digest 428, 63.

(*k*) This is not strictly speaking a reversion or remainder, as there cannot be such of personal chattels. 2 Bl. Com. 398. *Re Tritton, Ex parte Singleton* (1889), 61 L.T. 301; 7 Digest 33, 169.

(*l*) *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488; *Smart Bros., Ltd. v. Holt*, [1929] 2 K.B. 303; Digest Supp.

affect the property rights in the chattels, *e.g.*, an option of purchase, a right to rent, a duty to pay rates and taxes or to insure. These are contractual rights enforceable only by action—choses in action. The owner, therefore, of goods which are let, has two classes of things which he may desire to dispose of—property rights in the chattels and contractual rights in the agreement. The hirer may desire to dispose of his contractual rights if he is permitted to do so by the agreement—which is unlikely, although it has been held that where his right to assign is not restricted by the agreement the hirer has an assignable interest in it (*m*). The hirer cannot dispose of the chattels themselves as by Common Law, a sale by the bailee of chattels is considered as so wholly inconsistent with the bailment as to determine it and entitle the owner to recover the chattels forthwith (*n*). But it would appear that, unless the agreement expressly excludes it, the hirer has a proprietary interest in a chattel left under a hire-purchase agreement in ordinary form, and this is assignable, but the assignee can only take subject to the agreement (*m*). In fact the agreement invariably excludes any right of assignment by the hirer.

The question then arises as to how far the benefit or burden of the various obligations of the agreement can be assigned.

Assignment of Liabilities.—The general rule both in law and equity is that the liabilities under a contract cannot be assigned without the consent of the other contracting party (*o*).

(*m*) *Whiteley v. Hilt*, [1918] 2 K.B. 808; 3 Digest 107, 325. See also *Belsize Motor Supply Co. v. Cox*, [1914] 1 K.B. 244; 3 Digest 93, 247, and p. 120.

(*n*) See *ante*, p. 75, and *post*, p. 120; *Fenn v. Bittleston* (1851), 7 Ex. 152; 3 Digest 106, 317.

(*o*) *Tolhurst v. Associated Portland Cement Manufacturers*, [1902] 2 K.B. 660, at p. 668; affirmed, [1903] A.C. 414; 8 Digest 424, 29; *Robson v. Drummond* (1831), 2 B. & Ad. 303; 12 Digest 589, 4909.

“ You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract (p).”

Personal Contracts.—There are certain exceptions and one is where the liability assigned is not connected with the character, skill, credit or other personal qualifications of the assignor. In *British Waggon Co. v. Lea* (q), it was decided that a waggon company, which had let a number of waggons to the defendant, and agreed to keep them in repair during the letting and had subsequently assigned the benefit of the contracts under which they were let to the plaintiffs, the assignees on their part covenanting to perform the liabilities, had not thereby put an end to the contract, as the assignees were equally competent with the assignors, to keep the waggons in repair, and the personal competence or otherwise of the waggon company to repair had not been a material consideration in the formation of the contract, and that, therefore, the defendants had no answer to a claim for rent of the waggons. It is to be observed, however, that it was not held that the defendant was bound to look to the assignees for performance of the liabilities of the assignors. Cockburn, C.J. (r), says :—

“ In the view we take of the case, therefore, the repair
 “ of the waggons undertaken and done by the British
 “ company (the assignees) under their contract with the
 “ Parkgate Company (the assignors) is a sufficient
 “ performance *by the latter* of their engagement to repair
 “ under their contract with the defendants. Conse-
 “ quently, so long as the Parkgate Company continues to
 “ exist, and through the British Waggon Company
 “ continues to fulfil its obligation to keep the waggons
 “ in repair, the defendants cannot in our opinion be
 “ heard to say that the former company is not entitled
 “ to the performance of the contract by them. . . .”

(p) *Humble v. Hunter* (1848), 12 Q.B. 310, at p. 317 ; 1 Digest 639, 2606.

(q) (1880), 5 Q.B.D. 149 ; 12 Digest 589, 4917.

(r) At p. 154.

In other words, an assignment of liability does not discharge the original contracting party even in these excepted cases, unless he gets the liabilities performed. By consent of all parties, however, the assignor's liabilities may be discharged and transferred to the assignee but this amounts to novation, *i.e.*, a new contract, and is not, strictly speaking, assignment of the original contract.

Assignment of Rights.—Originally at Common Law as a general rule the benefit of a contract was not assignable without the consent of the other contracting party (*s*), although in equity it was generally assignable and the Court would compel the assignor to lend his name for the purpose of enforcing the rights of the assignee, and restrain the assignor from suing for his own benefit (*t*).

Absolute Assignment.—Now, by section 136 of the Law of Property Act, 1925 (*u*), any absolute assignment in writing (not by way of charge only) of any debt or legal chose in action, of which express notice in writing has been given to the debtor, is effectual in law to pass the legal right to the debt or chose in action, all legal remedies for it and the power to give a good discharge without the concurrence of the assignor. Conditional assignments are not within the Statute (*v*).

The rights of assignment in equity are unaffected, and such assignment does not require writing for its validity (*w*) or any particular form of words (*x*).

Rights incapable of Assignment.—Some rights, however, are incapable of assignment, *e.g.*, (*i*) where the effect would be to impose greater liability on the other

(*s*) *Jones v. Carter* (1845), 8 Q.B. 134 ; 8 Digest 441, 182 ; *Boulton v. Jones* (1857), 2 H. & N. 564 ; 12 Digest 598, 4963.

(*t*) *Torkington v. Magee*, [1902] 2 K.B. 427, 432 ; 8 Digest 430, 81 ; *Jefferies v. Day*, (1866), L.R. 1 Q.B. 372 ; 8 Digest 481, 496.

(*u*) 15 Halsbury's Statutes 313 ; re-enacting the substance of s. 25 (6) of the Judicature Act, 1873.

(*v*) *Durham Bros. v. Robertson*, [1898] 1 Q.B. 765, 771, C.A. ; 8 Digest 443, 196.

(*w*) *Lambe v. Orton* (1860), 1 Drew & Sm. 125 ; 8 Digest 425, 45.

(*x*) *Chowne v. Baylis* (1862), 31 Beav. 351, 360 ; 8 Digest 457, 298.

party to the contract (y) or (ii) a right under a purely personal contract such as a licence to seize goods (z), or (iii) apparently, where the parties have agreed that no rights shall be assignable (a), or (iv) where it is against public policy.

The problems to be discussed fall into two categories, (a) assignments by the owner, and (b) assignments by the hirer.

SECTION 2—ASSIGNMENT BY OWNER

Assignments by the Owner.—Generally speaking the owner has the right to assign either his property in the goods let or his interests in the hiring or hire-purchase agreement (except the licence to enter and seize, which will be dealt with later) (b) or both (c), as there is as a rule nothing so personal in the relation of the owner to the hirer as to entitle the latter to insist on retaining that relation (d). It matters not to the hirer to whom the hire-rent should be paid, nor who should do the repairs (e) (if, which is unlikely, the hirer himself is not under liability to do the repairs).

It should be borne in mind that the term "owner" has been defined by section 21 (1) of the Hire-Purchase Act, 1938, for the purposes of that Act and in relation to the hire-purchase agreements coming within its ambit. The definition is as follows :—

(y) *Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A.C., per Lord Lindley, at p. 423 ; 8 Digest 424, 29.

(z) *Kemp v. Baerselman*, [1906] 2 K.B. 604, C.A. ; 12 Digest 589, 4908 ; *Davies v. Davies* (1887), 36 Ch. D. 359, 394, C.A. ; 12 Digest 590, 4918 ; *Brown v. Metropolitan Counties, etc., Society* (1859), 1 E. & E. 832 ; 28 L.J. Q.B. 236 ; 18 Digest 281, 172 ; *Ex parte Rawlings, Re Davis & Co.* (1888), 22 Q.B.D. 193 ; 18 Digest 283, 179.

(a) *Re Turcan* (1888), 40 Ch. D. 5 ; 24 Digest 769, 7991 ; *Brice v. Bannister* (1878), 3 Q.B.D. 569, C.A. ; 8 Digest 428, 63.

(b) *Infra*, p. 118.

(c) *Ex parte Rawlings, Re Davis, supra* ; *In re Isaacson, Ex parte Mason*, [1895] 1 Q.B. 333 ; 3 Digest 97, 261.

(d) *Whiteley v. Hill*, [1918] 2 K.B. 808 ; 3 Digest 97, 262.

(e) *British Waggon Co. v. Lea* (1880), 5 Q.B.D. 149 ; 3 Digest 107, 324.

“ ‘Owner’ means the person who lets or has let goods to a hirer under a hire-purchase agreement, and includes a person to whom the owner’s property in the goods or any of the owner’s rights or liabilities under the agreement has passed by assignment or operation of law.”

Under this definition two or more persons might be “owner” simultaneously.

It will be as well to examine the problems that arise :—

(i) Under an assignment absolute or by way of security of the property in the goods only.

(ii) Under an assignment absolute or by way of security of the contractual rights only.

(iii) Under an assignment absolute or by way of security of both the property and the contractual rights.

Assignments of Property Rights.—(i) If the owner instead of assigning both the property rights and the contractual rights, merely assigns the property rights and leaves the contractual rights unaffected, what is the position? It is not a very satisfactory method from the assignee’s point of view, as it is by the contract that the owner is entitled to the hire-rent. It would appear that all the assignee would be entitled to would be the right at Common Law to seize the chattels at the termination of the bailment if he could do so without a trespass or a breach of the peace, and to sue in detinue for their return if he could not get possession peaceably (*f*), subject, of course, to the restrictions applicable in the case of hire-purchase agreements to which the Hire-Purchase Act, 1938 (*g*), applies. But if the assignment is in writing, then the observations in the foregoing pages as to the Bills of Sale Acts apply, according as to whether the assignment is absolute or by way of charge.

Absolute Assignment of Property Rights.—If the assignment is absolute and not by way of security or

(*f*) *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488; *Smart Bros., Ltd. v. Holt*, [1929] 2 K.B. 303; Digest Supp.

(*g*) See *ante*, p. 78.

charge, and if the agreement is being observed by the hirer and therefore the assignor has not the right to immediate possession, then, for the reasoning given on a previous page (*h*), although it is an assurance of personal chattels and therefore a bill of sale, it is submitted that the Bills of Sale Act, 1878, section 8 (*i*), will not apply, as the goods are not in the possession or apparent possession of the makers of the bill of sale. If, however, the hirer is in such default as to entitle the assignor to retake possession, then, although the chattels are not in the actual possession of the assignor nor even in his apparent possession within the definition in the Act, yet he might be deemed to be in constructive possession of the chattels, so as to bring them within the operation of section 8 (*j*).

Assignment by way of Security.—If the assignment is by way of charge, then, if in writing, the assignment is a bill of sale, and as such is absolutely void (*k*) if it does not comply with the requirements of the Bills of Sale Act, 1878, Amendment Act, 1882, as to registration and form.

Reputed Ownership.—Another question which arises on an assignment by an owner of the goods comprised in hire-purchase agreements, is how far the possession order and disposition section of the Bankruptcy Act, 1914 (*l*), applies. That section provides that the property of the bankrupt divisible among his creditors shall include *inter alia* :—

“ all goods, being at the commencement of the bankruptcy in the possession order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof.”

(*h*) *ante*, p. 47.

(*i*) 2 Halsbury's Statutes 91.

(*j*) See *Pollock & Wright*, Possession in the Common Law, p. 16 *et seq.*; *Jelks v. Hayward*, [1905] 2 K.B. 460; 3 Digest 96, 259; *Ancona v. Rogers* (1876), 1 Ex. D. 285; 7 Digest 113, 666; *Lincoln Waggon Co. v. Mumford* (1879), 41 L.T. 655; 7 Digest 117, 682.

(*k*) *Jarvis v. Jarvis* (1893), 63 L.J. Ch. 10; 7 Digest 29, 146.

(*l*) S. 38 (c); 1 Halsbury's Statutes 644.

Assuming the goods to have been let out by the assignor in his trade or business, would the goods come within this section, so as to defeat the assignee's claim to them, on the assignor's bankruptcy?

Constructive Possession.—There are a number of cases which show that it is not necessary for the bankrupt to have actual possession and that constructive possession will do. For instance, it has been held that the possession of the bankrupt's servant is the possession of the bankrupt (*m*). Similar decisions have been arrived at in the case of a bailee—the keeper of a bonded warehouse (*n*) ; of a depositee of a horse claiming a lien (*o*) ; of a hirer of a steam engine (*p*) ; and of a carrier (*q*). In each of these cases, however, except in the steam engine case—*Hornsby v. Miller* (*p*), which will be referred to in a moment—careful examination of the cases discloses a considerable difference in the circumstances from those associated with hire-purchase agreements. In the servant cases, it is reasonable to hold and it was expressly held in *Ex parte Bolland* (*r*), that the servant can have no possession as against his master ; in the bonded warehouse case, it was expressly held that the goods could not have been delivered from the warehouse to any other order than the bankrupt's ; in the case of the deposit of a horse, it was held that the bankrupt had no authority to make the contract and consequently the depositee had no lien and was bound to deliver up the horse ; and in the carrier case (*q*), it was held that the property had not passed to the consignee and presumably therefore the consignor could have stopped the delivery and recovered the parcel.

Hornsby v. Miller.—In *Hornsby v. Miller* (*p*), the

(*m*) *Ex parte Bolland* (1871), 24 L.T. 335 ; 5 Digest 759, 6529 ; *Jackson v. Irvin* (1809), 2 Camp. 48 ; 5 Digest 762, 6552.

(*n*) *Knowles v. Horsfall* (1821), 5 B. & Ald. 134 ; 5 Digest 752, 6487.

(*o*) *Ex parte Roy, Re Sillence* (1877), 7 Ch. D. 70 ; 4 Digest 410, 3715.

(*p*) *Hornsby v. Miller* (1858), 28 L.J. Q.B. 99 ; 1 E. & E. 192 ; 5 Digest 762, 6556.

(*q*) *Hervey v. Liddiard* (1815), 1 Stark. 123 ; 5 Digest 765, 6580.

(*r*) *supra*.

steam engine had at the time of the bankruptcy been hired by the bankrupt to a farmer for threshing purposes. The bankrupt had assigned the engine to the plaintiffs to secure the purchase price, and the question was between the plaintiffs and the assignee in bankruptcy, and at first sight this case would appear to cover the case of goods let under hire-purchase agreements. But no particulars are given in the report or were apparently known to the Court as to the length or conditions of the letting. It seems to have been assumed that it was for a very slight period such as a day or an hour. It does not appear whether a servant or employee of the hirer retained control of the machine, or whether the servants of the farmer had control. Further, in his judgment Lord Campbell, C.J., says :—

“ I give no opinion whether a chattel can be said to be
 “ in the order disposition or possession of a bankrupt
 “ when there was at the time of the bankruptcy, a
 “ bailment of the chattels to another, the bailee having
 “ a lien upon it or in such like cases.”

In the report in *Ellis & Ellis* (s) his words are reported as :—

“ I do not throw any doubt on the other cases which
 “ have been cited for the plaintiffs where a third party
 “ had a legal right to possession.”

It is apparent that the Court was of opinion that the farmer had not a legal right to possession.

It is submitted that a hirer who is observing the terms of his agreement has a legal right to possession and therefore comes within the meaning of these phrases, but in view of the above decisions the position is not free from doubt. The cases to which Lord Campbell refers are *Greening v. Clark* (t) and *Webb v. Whinney* (u) in both of which it was held that the possession of a pawnee

(s) 1 E. & E. 192 at 202.

(t) (1825), 4 B. & C. 316 ; 5 Digest 754, 6501.

(u) (1868), 18 L.T. 523 ; 5 Digest 788, 6755.

or pledgee of goods was not the possession of the bankrupt pawnor so as to bring them within the reputed ownership clause.

A hirer who is *not* observing the terms of his agreement is, however, at the mercy of the person by whom the goods are let, as the latter is entitled to recover possession, and therefore it might reasonably be argued that the latter has the constructive possession of them, within the section.

In practice, it is unusual for a hirer to make his payments punctually on the proper date, and the owner is usually technically in the position of being able to demand possession of the hired goods and therefore if the above argument is right, is usually in constructive possession of them.

Assignment of Contractual Rights.—(ii) If the owner takes the opposite step of assigning the contractual rights, but not the proprietary rights (*v*), the difficulty as to the Bills of Sale Act is avoided as the contractual rights are choses in action and as such are not affected by either of the Bills of Sale Acts, but other difficulties arise.

Rent.—In the first place, what is the position as regards arrears of rent, and payments of rent to be made in the future under the agreement, as against the trustee in bankruptcy of the assignor? The determination of this problem appears to depend upon the answers to the following questions: (a) Do the future instalments of rent, whether immediately payable or not, amount to “debts due or growing due” to the bankrupt at the commencement of the bankruptcy in the course of his

(*v*) It may be convenient to mention here a method frequently employed by Finance Companies of carrying out this object, *viz.*: to take a deposit of the hire-purchase agreements coupled with an agreement by the owners undertaking to assign the benefit of the agreements on request, or merely to take an agreement to deposit and assign coupled with a declaration of trust for the Finance Company until assignment. See *Blakey v. Trustees of Property of Pendlebury*, [1931] 2 Ch. 255; Digest Supp.

business within the reputed ownership clause (*w*). (b) Has notice of the assignment been given to the hirer?

In re Davis, Ex parte Rawlings.—A group of cases which go a long way to provide the answer arose in the very instructive bankruptcy of *In re Davis*, in respect of which three cases are reported, *Dewars'* case and *Pipe's* case in *Weekly Notes* (*x*) and *Fuchsbalg's* case in the *Law Reports* (*y*). All these cases are in respect of one form of hire-purchase agreement.

Davis was a furniture dealer and a hire trader. The form of hire-purchase agreement used by him appears to have been that known as a *Lee v. Butler* agreement, *i.e.*, it amounted to an agreement on the part of the hirer to buy for a fixed price by instalments. Davis had a number of these agreements current when in 1886 he got into financial difficulties. In order to overcome them he (*a*) deposited several of the agreements with Messrs. Dewar & Co., (*Dewars'* case) as security for a trade debt, but the transaction was not in writing and notice was not given to the hirers; (*b*) by deed assigned all moneys due or to accrue due to him under certain other of the agreements, and all rights and remedies under the agreements to W. Pipe absolutely in satisfaction of certain trade debts. Notice was given to the hirers before the commencement of the bankruptcy (*Pipe's* case); and (*c*) by deed assigned all his right and interest in certain other of the agreements to E. Fuchsbalg to secure an advance of £1,000. Notice was given to the hirers, presumably before the commencement of the bankruptcy, but the exact date does not appear in the report (*Fuchsbalg's* case).

It was held in each of the cases that none of the assignments were bills of sale or affected by the Bills of Sale Acts, as they were merely assignments of choses in action, but that the instalments were debts growing due.

Dewars' Case.—In *Dewars'* case, it was held that the assignment could not prevail against the trustee in bank-

(*w*) Bankruptcy Act, 1914, s. 38 (*c*).

(*x*) *In re Davis & Co., Ex parte Rawlings, Dewars' Case, Pipe's Case*, [1888] W. N. 225; 5 Digest 696, 6125.

(*y*) *In re Davis & Co., Ex parte Rawlings* (1888), 22 Q.B.D. 193.

ruptcy, because the debts had not been validly assigned. The note of the judgment is very short and presumably the reference here is to the failure by the assignee to give notice to the hirers of the assignment, resulting in the operation of the reputed ownership section as the effect of the cases appears to be that failure to give notice of the assignment of debts is conclusive evidence of the consent of the true owner to the debts continuing in the reputed ownership of the bankrupt (z).

Pipe's Case and Fuchsbalg's Case.—In *Pipe's* case, the transaction was held to be a valid assignment and good against the trustee as to instalments payable after the commencement of the bankruptcy, and the same result was arrived at in *Fuchsbalg's* case which went to the Court of Appeal. In this Court the decision in *Ex parte Nichols, Re Jones* (a) was distinguished. In that case it had been decided that an assignment by the lessees of the Alexandra Palace of the future receipts of the admission fees to the Palace, was as regards those accruing after the commencement of the bankruptcy, void as against the trustee. But it was pointed out by the Court of Appeal that in *Nichols's* case what was attempted to be assigned was not a debt, nor could anything become due unless the business of the Alexandra Palace was carried on, which would depend entirely upon whether the trustees decided to carry it on or not.

Wilmot v. Alton.—The matter was further discussed in *Wilmot v. Alton* (b), in which the bankrupt had agreed to supply a theatrical company with dresses and keep them in repair for £40 per week for twelve weeks, and had subsequently charged her interest in the agreement with

(z) *Ryall v. Rolle* (1750), 1 Ves. Sen. 348, 375; 5 Digest 751, 6484; *Edwards v. Martin* (1865), L.R. 1 Eq. 121; 5 Digest 777, 6672; *Re Tillett* (1889), 6 Mor. 70; 5 Digest 775, 6658; *Rutter v. Everett*, [1895] 2 Ch. 872; 5 Digest 774, 6657; *Re Neal*, [1914] 2 K.B. 910; 5 Digest 775, 6659.

(a) (1883), 22 Ch. D. 782; 5 Digest 697, 6129.

(b) [1897] 1 Q.B. 17; 5 Digest 696, 6126.

the plaintiff as security for an advance. Before the twelve weeks expired, and before any money became payable, the bankruptcy supervened and notice of the assignment was only given later, and it was held that the assignment was not valid against the trustee in respect of money which became due under the contract after the bankruptcy, because at the commencement of the bankruptcy there were no debts in existence to be assigned ; they would only come into existence at the end of the twelve weeks, if the conditions as to repair had been fulfilled, and it was for the trustee to decide whether he would carry on the contract by fulfilling those conditions, in which case the remuneration would be earned by him and not by the bankrupt. Rigby, L.J., in the course of his judgment (c) said :—

“ Where a person who has entered into contracts in the
“ course of his business, ceases to carry on business on
“ account of bankruptcy, there is an important distinction,
“ for the present purpose, between cases in
“ which the consideration for the contract having been
“ fully executed by the bankrupt on his part, a sum of
“ money becomes due to him under the contract, and
“ cases of executory contract in which the money will not
“ be earned under the contract, unless the person contracting
“ continues to carry on business and fully performs his part of the contract, which has only been
“ partially performed at the date of the bankruptcy. In
“ the latter class of cases the bankrupt cannot create
“ greater rights in favour of an assignee from him than
“ he has himself ; it rests with the trustee to say whether
“ the business is to be carried on and the contract
“ performed or not, and if he elects to perform it, he has
“ a right to the consideration for such performance when
“ it becomes due.”

The ground of the decision appears to be not that the debt was in the reputed ownership of the bankrupt, but that the bankrupt never had the debt to assign, and so could not assign it. What is the position then as regards

(c) At p. 22.

instalments which may become due in the future if the hirer sees fit to continue the hiring, under ordinary hire-purchase agreements—*i.e.*, agreements to hire with an option to purchase, where the benefit of the agreements has been assigned, but no notice of the assignment has been given to the hirers, and the assignor has subsequently been adjudicated bankrupt? It has recently been decided that even in such cases these future instalments are “debts . . . growing due” to the bankrupt in the course of his trade or business within section 38 (c) of the Bankruptcy Act, 1914 (*d*).

In that case *Blakey v. Trustees of Pendlebury* (*e*), a trader engaged in the piano business, had let certain pianos to hirers under agreements which may be described as *Helby v. Matthews* agreements. He subsequently entered into various agreements with a Finance Company whereby he agreed to deposit certain hire-purchase agreements with the company and on demand to assign to the company the benefit of the agreements and, meanwhile, to hold them in trust for the company. No notice of any assignment was given until after adjudication. The plaintiff who was the assignee of the Finance Company, claimed an assignment from the Trustee in Bankruptcy of the hire-purchase payments and an account of such payments received since the bankruptcy.

The Court of Appeal decided that he was not entitled to succeed, that the payments of hire-rent which after the commencement of the bankruptcy had or would become payable under the hire-purchase agreements were “debts . . . growing due to the bankrupt in the course of his trade or business,” within section 38 (c) of the Bankruptcy Act, 1914 (*d*), and were accordingly available for distribution among his creditors.

It will be seen, therefore, that the principles laid down in the *Davis* bankruptcy discussed in the foregoing pages apply also to agreements in the form known as *Helby v. Matthews*.

(*d*) 1 Halsbury's Statutes 644.

(*e*) [1931] 2 Ch. 255; Digest Supp.

Right to Retake Possession.—Another difficulty arises if contractual rights alone are assigned and not the property rights, and that is as to the right to take possession of the goods in case of default by the hirer. In every hire-purchase agreement the right is reserved to the owner, in the event of default by the hirer in paying the hire-rent or performing the other conditions of the contract, of retaking possession of the goods and of entering into the hirer's premises for that purpose. Is this a right of contract which is assignable? It has been decided in *Brown v. Metropolitan Counties Life Assurance Society* (f) that it is not. It was there held that a licence to seize goods was clearly a personal authority to be exercised by the licensee, and that on assignment it would be left to the assignee to judge in each case whether to seize or not and the personal authority of the original licensee would be gone and that therefore the assignment was invalid. The matter was further discussed in the *Fuchsbalg* case of the *Davis* bankruptcy (g). In that case the hire-purchase agreement contained a clause entitling the owner to enter and seize and sell the goods and for that purpose if necessary to break outer and inner doors. It was held (h) following *Brown v. Metropolitan Counties Life Assurance Society* (i) that this was a personal licence which could not be legally assigned.

If therefore the clause amounts to a licence to seize goods, it is not assignable, and an assignee of the contractual rights only, has no power to enter and take possession in the event of the hirer making default, and in view of the fact that no property rights have passed to him, he cannot sue in detinue, but can only sue for damages for breach of the agreement, a remedy which in the majority of cases would have little value. Further,

(f) (1859), 28 L.J. Q.B. 236 ; 1 E. & E. 832 ; 18 Digest 281, 172.

(g) *In re Davis, Ex parte Rawlings* (1888), 2 Q.B.D. 193 ; 5 Digest 696, 6125.

(h) At p. 198.

(i) *supra*.

in order to enable him to sue in his own name, the provisions of section 136 of the Law of Property Act, 1925 (*j*), must have been complied with.

Assignment of Property Rights and Contractual Rights.—(iii) Finally, the assignment may be of both property rights and contractual rights. If the assignment is by deed or in writing, and is absolute and not by way of charge, then, so far as relates to the property, the observations in paragraph (i) above apply (*k*), and the contractual rights being choses in action are not affected by either of the Bills of Sale Acts. In order to make effectual the assignment of the contractual rights, the provisions of the Law of Property Act, 1925, previously referred to, must be complied with and notice given to the hirer, and the assignee will only take subject to any claim which would have been available against the assignor (*l*).

If the assignment of both the property rights in the chattel and the contractual rights in the agreement is by way of charge and so as not to be severable, then, if in writing, the document is a bill of sale being an assurance of personal chattels, and as such it is absolutely void, if it does not comply with the requirements of the Bills of Sale Act (1878), Amendment Act, 1882 (*m*), as to registration and form, but if the assignments of the proprietary rights and of the contractual rights, though in one document, are separate and distinct, then so far as concerns the chattels the document is a bill of sale and void for want of compliance with the statutory requirements, but the assignment of the contractual rights is severable and valid (*n*).

Verbal Assignment.—It would not be at all satisfactory in the ordinary case to assign without writing,

(*j*) 15 Halsbury's Statutes 313.

(*k*) See *ante*, p. 109.

(*l*) *Torkington v. Magee*, [1902] 2 K.B. 427, 432; 8 Digest 430, 87.

(*m*) *Jarvis v. Jarvis* (1893), 63 L. J. Ch. 10; 7 Digest 29, 146.

(*n*) *In re Isaacson, Ex parte Mason*, [1895] 1 Q.B. 333; 7 Digest 56, 302.

whether absolutely or by way of security, either the property rights or the contractual rights, in as much as the provisions of the Sale of Goods Act, 1893, would apply to goods to the value of £10 or more (*o*), and although the assignment of the contractual rights might be enforceable in equity, such an assignment would be subject to all the disadvantages of an equitable assignment. *e.g.*, the assignee could not sue in his own name and all interested parties would have to be joined in the action (*p*).

SECTION 3—ASSIGNMENT BY HIRER

Hirer.—The term “hirer” has been defined by section 21 (1) of the Hire-Purchase Act, 1938, for the purposes of that Act and in relation to the hire-purchase agreements coming within the ambit of the Act as being :

“The person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer’s rights or liabilities under the agreement have passed by assignment or by operation of law.”

This definition recognises that a hirer may have an assignable interest in the agreement. It has been decided (*q*) that a hirer has such an interest in a hire-purchase agreement, unless the agreement provides that the hirer shall have no power to assign the goods or any interest in them. Since the decision such a provision is usually inserted in the agreement for the protection of the owners. And, further, although in the ordinary course of things a hire-purchase agreement is not in its nature so

(*o*) *Ante*, p. 10 *et seq.*

(*p*) *Durham Bros. v. Robertson*, [1898] 1 Q.B. 765, 774, C.A.; 8 Digest 443, 196; *Bergmann v. Macmillan* (1881), 17 Ch. D. 423; 36 Digest 441, 1080. But see *Brandt v. Dunlop*, [1905] A.C. 454, 462 (8 Digest 445, 205), where Lord Macnaghten says: “But no action is now dismissed for want of parties.” Presumably if not originally joined, parties will be added, on terms, in the Court’s discretion.

(*q*) *Whiteley v. Hilt*, [1918] 2 K.B. 808; 3 Digest 97, 262.

personal as to preclude assignability of interests under it, it is conceivable that in a special case, circumstances or the form of the agreement might render the relationship between the owner and the hirer so personal as to have this effect.

It is worth while examining in some detail the case of *Whiteley v. Hilt* (q) referred to above.

“ In this case, a Miss Nolan hired a piano on the terms that she was to have an option to purchase it by payment of a number of quarterly instalments, but had the right at any time to determine the hiring by returning the piano. She agreed not to remove the piano from the address mentioned, but nothing was expressly provided as to selling the piano. There was included in the agreement what is known as a ‘Redemption Clause’ whereby, if, on any breach by the hirer of the terms of the agreement the owners should retake possession of the piano, (as they were entitled to do), the hirer might resume the hiring on payment of arrears of hire and finding a guarantor to the satisfaction of the owners. After a substantial amount had been paid by way of hire, and before any breach of the agreement had occurred, Miss Nolan sold the piano to the defendant Hilt. The owners on ascertaining these facts in consequence of the instalments getting into arrears, demanded the return of the piano, which Miss Hilt refused to do but offered to pay the remaining instalments and find a substantial guarantor. The owners not satisfied with this offer brought an action in detinue, and alternatively in trover for the recovery of the piano or damages, and the defendant paid into Court the amount of the outstanding instalments, viz. £18 17s. 5d.”

It was decided that Miss Nolan had possessed a proprietary interest in the chattel and in the hire-purchase agreement which was assignable, and that the defendant had acquired Miss Nolan’s interest therein, but that the defendant could only retain the chattel upon the terms of the contract; that Miss Nolan by selling the piano had not under the circumstances repudiated the contract (though it appears to have been agreed by all the judges

that had the contract been a simple bailment the sale would have been so entirely inconsistent with it as to amount to repudiation) (r) ; that the agreement in question conferred much more than merely a right to hire the piano ; it conferred an option to purchase, and also a right to redeem in the event of the piano being seized by the owners for any breach of the agreement ; and that as there was nothing so personal in the relation of owner and hirer as to preclude the application of the rule that the benefit of a contract is assignable in equity and can be enforced by the assignee, it followed that Miss Hilt took the benefit of the hire-purchase agreement, and was bound by its obligations. The refusal by the defendant to deliver up on demand was apparently treated by the Court as a conversion (or perhaps only as a breach of contract—it is not very clear from the judgment¹ entitling the plaintiffs to damages in view of the fact² that the owners were entitled to the return of the piano, ^{or} if any instalment of hire-rent was in arrear. In view of the right of redemption already referred to it was further decided, however, that Miss Hilt still had an interest in the piano, and that therefore the measure of the plaintiffs' damages (s) was not the value of the piano, but only the value of the plaintiffs' interest in it after allowing for that of the defendant, *viz.* : the value of the outstanding instalment—£18 17s. 5d., and as this amount had been tendered and paid into Court, the defendant was entitled to judgment.

Warrington, L.J., in his judgment, (t) said :—

“ Secondly, I desire to say that in my judgment, with
 “ all respect, the learned judges in the Divisional Court
 “ ignored the complex nature of this contract, treating it
 “ as a contract of bailment simply, and nothing else. If

(r) See judgment of Swinfen Eady, M.R., at p. 819, and Warrington, L.J., at p. 821.

(s) On the question of measure of damages in conversion and detinue, see *post*, p. 249 *et seq.*

(t) At p. 821.

“it had been a contract of bailment simply, then it may be that an act of the bailee inconsistent with the bailment would have put a complete end to that contract. A very good example of that is found in the case of *Mulliner v. Florence*. That was a case of the deposit with an innkeeper which was destroyed, as one would expect, by parting with possession, which was the essence of the agreement. But in a complex contract of this nature it by no means follows that because that part of the contract which is a contract of bailment is at an end, the other part of the contract which confers a proprietary interest is also at an end.”

And Swinfen Eady, M.R., says at p. 819:—

“A bailment may be determined by doing any act entirely inconsistent with the terms of the bailment: *Fenn v. Bittleston*; but it does not follow from that that if the bailee has any further interest in the chattel of a proprietary kind, he forfeits that interest by any dealing with the chattel not warranted by the terms of the bailment. There is no foundation for such a notion: *Donald v. Suckling*; *Halliday v. Holgate*.”

There is another decision given some four years prior to the case of *Whiteley v. Hilt*, dealing with the question of assignability of the benefit of hire-purchase agreements, viz. *Belsize v. Cox* (u). This is a somewhat unsatisfactory decision. The facts were as follows:—

The plaintiffs let to a hirer a motor car by a hire-purchase agreement, the terms of which Channell, J., found to be within *Helby v. Matthews* (v) and not *Lee v. Butler*, (w) i.e., on terms which gave the hirer an option to buy, but did not bind him to buy. There was no redemption clause. Before all the instalments were paid, and while part of them were in arrear, the hirer pledged the vehicle with the defendant Cox, to secure an advance of £300 and interest, by an agreement, the terms of which expressly gave Cox the power of selling the vehicle in the event of default by the hirer, and the learned judge held that this was a wrongful pledge by the hirer. The plaintiffs sued Cox for the recovery of the car, and

(u) [1914] 1 K.B. 244; 3 Digest 93, 247.

(v) [1895] A.C. 471; 3 Digest 93, 245.

(w) [1893] 2 Q.B. 318; 3 Digest 92, 241.

apparently also in the alternative for damages for conversion.

On these facts one might have expected a verdict for the plaintiff in detinue for the recovery of the car or its value following the decisions in *Nyberg v. Handelaar* (x) and the other cases cited at p. 155 *et seq.*, on the ground that the pledge by the hirer was so inconsistent with the purpose of the bailment as to determine it and remit the plaintiffs immediately to their right of possession. These cases were not, however, cited to the learned judge who made the following observations in the course of his judgment :—

“ A pledgee or purchaser takes such title as his pledgor
“ or vendor has, and here whether the pledge to the
“ defendant was rightful or wrongful (in this case it was
“ wrongful) yet the defendant thereby acquired such
“ rights as the Burgess Company, the original hirers, had.
“ He might have completed his title as against the
“ plaintiffs by tendering the amount of the purchase
“ money remaining unpaid by the Burgess Company.
“ In the view I take of the agreement of December 10th,
“ 1910, the hirers did not lose their right to purchase the
“ cab merely by making default in the payment of the
“ instalments. That default did not *ipso facto* determine
“ the bailment. On default, Clause 6 of the agreement
“ gives the plaintiffs an option to take possession of the
“ cab and to determine the agreement. That option has
“ to be exercised, otherwise the agreement continues in
“ force ; until it is exercised the right of the hirers subsists
“ to pay all the purchase money and acquire the property
“ in the cab. This construction makes Clauses 5 and 6
“ hang together. If this be the true view of the agree-
“ ment, then the defendant has acquired an interest in
“ the cab. . . .”

It would appear, therefore, that the decision was arrived at by the learned judge not on the Common Law rights of the parties but on his view of the true construction of the agreement. He held that the pledge

(x) [1892] 2 Q.B. 202 ; 3 Digest 111, 353.

obtained merely the rights which the hirer had (y), but in view of the fact that the hirer was in arrear with his instalments, then the pledgee obtained something which the owner could put an end to at any moment under clause 6, and the owners appear to have done their best to do so by demanding the return of the car as soon as they discovered that the pledgee had it in his possession, although it is true that they did not formally terminate the agreement. One might argue that if the hirer by his wrongful pledge did pass any interest to the pledgee, that interest was determined at and by the demand made by the owners on the pledgee (z).

It should be borne in mind when considering the effect of *Belsize v. Cox*, that it was expressly decided on the effect of the clauses present in the hire-purchase agreement there in question, which are by no means normal or in the form common to-day. In particular, there does not appear in the agreement (and the same applies to the agreement in *Whiteley v. Hilt*) a clause empowering the owners under certain circumstances to put an end to the agreement altogether for all purposes, such as appears in the agreement in *Smart v. Holt* (a). It is submitted that after such termination any rights of property or interests in the goods, agreement or option would be at an end both for the hirer and for his assignee, and the parties to the agreement would be remitted to their Common Law rights.

It is to be noted further that in neither of these two agreements is there a clause expressly forbidding assignment of the option to purchase or any interests in the hire-purchase agreement.

(y) See *Brierly v. Kendall* (1852), 17 Q.B. 937; 7 Digest 133, 756; *Chinery v. Viall* (1860), 5 H. & N. 288; 39 Digest 680, 2672; *Johnson v. Stear* (1863), 15 C.B.N.S. 330; 43 Digest 510, 490, for decisions on the rights of pledgees to sell or re-pledge.

(z) See *Jelks v. Hayward*, [1905] 2 K.B. 460; 3 Digest 96, 259.

(a) [1929] 2 K.B. 303; Digest Supp.

CHAPTER 4

BANKRUPTCY OF THE HIRER

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SECTION 1—BANKRUPTCY OF HIRER

It is of importance to all concerned in the hiring or hire-purchase of chattels, to appreciate the effect of the hirer's bankruptcy upon the property in and possession of the chattels. There is, however, only one portion of the Bankruptcy Acts which is of real importance in this respect, *viz.*: that dealing with what is known as the order and disposition, or reputed ownership section, and that only in the case of hirers engaged in "trade or business." In this connection the order and disposition clause of the Distress Act, 1908 (*a*), is wider, in that it is not confined to tenants engaged in trade or business. Nevertheless, the authorities in Bankruptcy matters are frequently of considerable assistance in cases arising under the Distress Act and *vice versa*, and the reader is therefore requested to refer also to Chapter 6, section 3, when questions under the reputed ownership section arise.

Property Divisible.—By section 38 of the Bankruptcy

(a) Law of Distress Amendment Act, 1908, s. 4 (2); 5 Halsbury's Statutes 162. See p. 354.

Act, 1914 (b), it is provided that the property of the bankrupt divisible among his creditors, shall comprise :—

(a) " All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge ; and

(b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice ; and

(c) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof ; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section."

By section 167 (c) " property " is defined as including, " money, goods, *things in action*, land, and every description of property, whether real or personal and whether situate in England or elsewhere ; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

The bankrupt hirer's interests in the hire-purchase agreement, including the option to purchase, pass therefore to the trustee in bankruptcy, subject to his being able on his part to fulfil the hirer's part of the agreement. This may be impossible or too onerous and consequently the trustee in the majority of cases will disclaim the agreement. He may, however, claim the goods under subsection 38 (c), and it will be necessary, therefore, to examine with care the circumstances under which the subsection will apply.

(b) 1 Halsbury's Statutes 643.

(c) 1 Halsbury's Statutes 705.

It must be borne in mind, however, that section 38 (1) and (2), expressly excludes property held by the bankrupt on trust for other persons, and tools of trade, and wearing apparel of his wife and family to a total value of £20, from being liable to division among the bankrupt's creditors.

Hire-Purchase Act, 1938.—Further, by section 16, subsection (1), of the Hire-Purchase Act, 1938, where under the powers conferred by that Act the Court has postponed the operation of an order for the specific delivery of goods to any person, the goods shall not, during the postponement, be treated as goods which are by the consent or permission of that person in the possession or disposition of the hirer, for the purposes of section 38 of the Bankruptcy Act, 1914. This subsection applies from the date of the commencement of the Act, *i.e.*, the 1st January, 1939, to all hire-purchase agreements coming within its scope—irrespective of whether the agreement was made before or after the commencement of the Act, provided that the order of postponement was made on or after the 1st January, 1939 (*d*).

Commencement of Bankruptcy.—The commencement of the bankruptcy, whether bankruptcy takes place on the debtor's own petition or on that of a creditor or creditors, is the time of the committal of the act of bankruptcy on which a receiving order is made, and if there are several acts of bankruptcy, then the commencement of bankruptcy is the time of the first of these acts proved to have been committed by the bankrupt within three months preceding the date of the presentation of the bankruptcy petition (*e*).

Possession, Order, or Disposition.—It is to be noted that the words are “possession, order, *or* disposition,” and it is enough if the goods are merely in the possession of the bankrupt in his trade or business and not in his

(*d*) S. 20 (1) (d) ; Appendix A, *post*, p. 305.

(*e*) Bankruptcy Act, 1914, s. 37 ; 1 Halsbury's Statutes 642.

disposition, the words “ order or disposition ” enlarge the word “ possession ” so as to include something beyond visible occupation by a reputed owner (*f*). The questions as to whose possession the goods are in and in whose order and disposition are questions of fact (*g*).

By decisions under the Bankruptcy Act, 1869, it has been held that goods to come within section 15 (5) must be in the sole possession and the sole reputed ownership of the bankrupt (*h*).

In his Trade or Business.—The words “ in his trade or business ” which first appear in the Bankruptcy Act, 1883, and were substituted for the wider words “ being a trader,” which were used in section 15 (5) of the Bankruptcy Act, 1869, restrict the operation of the subsection to those persons only who carry on a trade or business, and to such of those persons’ goods only, as are in their possession order or disposition for the purpose of or in connection with, their trade or business (*i*). Such goods, therefore, as household furniture are excluded, unless, of course, acquired and used for the trade or business. The goods must not be merely employed in the bankrupt’s trade or business, but acquired for the purposes of the business and used for those purposes (*j*). Goods which are owned by a third party (*e.g.*, the owner of goods let out on hire) are not within the section unless they are left with the bankrupt under such circumstances that as reputed owner he could have sold them or otherwise obtained credit

(*f*) *Sharman v. Mason*, [1899] 2 Q.B. 679, *per* Darling, J., at p. 687 ; 5 Digest 787, 6744.

(*g*) *Edmands v. Best* (1862), 1 New Rep. 30 ; 5 Digest 750, 6475. *Ex parte Emerson, Re Hawkins* (1871), 41 L.J. Bcy. 20 ; 5 Digest 756, 6515. And see generally, p. 188 *et seq.*

(*h*) *Ex parte Dorman, Re Lake* (1872), 8 Ch. App. 51 ; 5 Digest 763, 6561. *Ex parte Fletcher, Re Bainbridge* (1878), 8 Ch. D. 218 ; 5 Digest 763, 6562.

(*i*) *Re Jenkinson, Ex parte Nottingham and Nottinghamshire Bank* (1885), 15 Q.B.D. 441 ; 5 Digest 787, 6743 ; *Colonial Bank v. Whinney* (1885), 30 Ch.D. 261 *per* Cotton, L.J., at p. 274 ; 5 Digest 787, 6745.

(*j*) *Colonial Bank v. Whinney* (*supra*), *per* Lindley, L.J., at p. 281. This case was reversed in the House of Lords (1886), 11 App. Cas. 426, but the dicta referred to here and in the previous note were not interfered with. *Lamb v. Wright & Co.*, [1924] 1 K.B. 857 ; Digest Supp.

for them in the course of his trade or business (*k*). What is a trade or business appears to be a question of fact (*l*). It has been held that a lodging house keeper who does not provide board, carries on a trade or business (*m*).

Consent of the True Owner.—The words “by the consent of the true owner under such circumstances that he is the reputed owner thereof” are also to be noted carefully. It is necessary that the true owner should have consented to a state of things necessarily leading to the inference of ownership by the bankrupt (*n*). The real relation of the parties is to be taken into consideration in determining the question of the consent of the owner.

Determination of Consent.—The consent of the true owner may in certain cases be determined or withdrawn in such a way as to defeat the operation of the statute. A mere demand of possession prior to an act of bankruptcy (*o*), or even after but before notice of an available act of bankruptcy (*p*), has been held sufficient. Where the true owner was unable to make a demand, but did all he could short of forcibly entering the house where his chattels were, to recover them, consent was negatived (*q*). A mere intention to take possession or the happening of an event which would entitle the true owner to take possession, is not enough; there must be something done

(*k*) *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426, *per* Lord Watson, at p. 440; 5 Digest 787, 6745.

(*l*) *Ex parte Sully, Re Wallis* (1885), 14 Q.B.D. 950; 5 Digest 786, 6740.

(*m*) *Re Harrison, Ex parte Official Receiver* (1892), 10 Morr. 1; 5 Digest 786, 6741.

(*n*) *Load v. Green* (1846), 15 M. & W. 216; 5 Digest 789, 6762; *Smith v. Hudson*, 34 L.J. Q.B. 145; 5 Digest 795, 6798; *Hamilton v. Bell* (1854), 10 Ex. 545; 5 Digest 798, 6824; *Gibson v. Bray* (1817), 8 Taunt. 76; 5 Digest 798, 6821; *Re Kaufman Segal & Domb, Ex parte Trustee*, [1923] 2 Ch. 89; Digest Supp.

(*o*) *Re Couston, Ex parte Ward* (1872), 8 Ch. App. 144; 5 Digest 791, 6774.

(*p*) *Re Wright, Ex parte Arnold* (1876), 3 Ch. D. 70; 5 Digest 767, 6594; *Ex parte Montagu, Re O'Brien* (1876), 1 Ch. D. 554; 5 Digest 791, 6777.

(*q*) *Re Sparke, Ex parte Cohen* (1870), 40 L.J. Bcy. 14; 5 Digest 792, 6783. And see *Re Eslick, Ex parte Phillips, Ex parte Alexander* (1876), 4 Ch. D. 496; 5 Digest 793, 6784.

actively, to prevent the operation of the section (r), but the demand or attempt to take possession must be made before the date of the receiving order (s). In many modern hire-purchase agreements in an endeavour to defeat the "order or disposition" section, a clause is inserted making the continuance of the owner's consent dependent upon certain conditions precedent, being fulfilled, *viz.*, that the hirer should refrain from doing any act or thing upon which an act of bankruptcy might subsequently be founded. This ingenious device has not yet been tested in the Courts.

In the case of *Re Watson & Co., Ex parte Atkin Brothers* (t), Vaughan Williams, L.J., cites many of the old decisions, and says: "In our opinion it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such a manner and under such circumstances that the reputation of ownership must arise . . . the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise."

See also Chapter 6, p. 188, where this subject has been dealt with more fully when discussing the Law of Distress Amendment Act, 1908.

Reputed Ownership.—It is worth while repeating *in extenso* here the words of Lord Selborne, L.C., in his judgment in *Ex parte Watkins, Re Couston* (u), which

(r) *Spackman v. Miller* (1862), 12 C.B.N.S. 659 ; 5 Digest 792, 6778 ; *Hornsby v. Miller* (1858), 1 E. & E. 192 ; 5 Digest 762, 6556 ; and see judgment of Lord Campbell in *Brewin v. Short* (1855), 24 L.J. Q.B. 297, at p. 301 ; 5 Digest 792, 6781.

(s) Bankruptcy Act, 1914, s. 45 (i) ; 1 Halsbury's Statutes 650.

(t) [1904] 2 K.B. 753, at p. 756 ; 5 Digest 787, 6746.

(u) (1873), 8 Ch. App. 520, at pp. 528-9 ; 5 Digest 808, 6898.

have since been frequently cited in other judgments with approval. He says :—

“ the doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership ; that reputation arising by the legitimate exercise of reason and judgment or the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed ; but the Court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn from those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being and naturally would be, the subject of general knowledge to those who took any means to inform themselves on the subject. So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to show that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about the particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about the situation could infer the ownership to be in the person having actual possession.”

Goods of a third party which are on the bankrupt's premises at the time of the committing of the act of bankruptcy are not in his order and disposition if, at the time of the act of bankruptcy, there was a distress for rent upon the goods (*v*), but if after distress and appraisal the landlord leaves the goods on the premises for the use of the tenant's wife while the tenant is in prison, on the tenant's bankruptcy the goods pass to his assignees as being in his order and disposition (*w*).

(*v*) *Sacker v. Chidley* (1865), 11 Jur. N.S. 654 ; 5 Digest 766, 6585.

(*w*) *Ex parte Shuttleworth, Re Deane* (1832), 1 Deac. & Ch. 223, Ct. of R. ; 5 Digest 766, 6586.

The mere fact that there has been placed upon the goods the name or initials of the true owner or of the bankrupt is not in itself conclusive evidence that the goods are or are not within the reputed ownership clause, but the whole of the circumstances of each case must be looked to (x).

It has been decided that the true owner of goods left with the bankrupt for sale, and adjudged to pass to the trustee as being in the order and disposition of the bankrupt, may prove in the bankruptcy for the value of the goods (y). This was a decision of the Court of Appeal and it would appear to be available to assist the owner of hired goods which have been lost by reason of the operation of this section if the hire-purchase agreement be properly drawn. Buckley, L.J., says in his judgment (z) :

“ At the date of the bankruptcy the debtor was under such obligations as resulted from the contract of bailment. It is true that down to the moment of the presentation of his petition, no right of action had arisen but there was, as it seems to me, in the bankruptcy proceedings a breach, by reason of the bankrupt's suffering an act which prevented him from performing his contract. . . . Being under the obligation above stated, a state of things ensued by virtue of which the true owner was dispossessed of his goods and the debtor became incapable of performing the contract of bailment. It seems to me that there thus arose a liability by reason of the obligation under which the debtor lay at the date of the receiving order and that this gave rise under section 37, subsection 3 (a) to a probable claim.”

This reasoning has been held in the County Court to apply, also, to the case of an owner who lost his goods because the hirer, (who had mortgaged the premises on

(x) *Lingard v. Messiter* (1823), 1 B. & C. 308 ; 5 Digest 797, 6808 ; *Watson v. Peache* (1834), 1 Bing. N.C. 327 ; 5 Digest 804, 6870 ; *Ex parte Marrayable, Re Brown* (1824), 1 Gl. & J. 402 ; 5 Digest 796, 6803 ; *Ex parte Dover, Re Popple* (1841), 2 Mont. D. & De G. 259 ; 5 Digest 796, 6804.

(y) *Ex parte Haviside, Re Button*, [1907] 2 K.B. 180 ; 4 Digest 307, 2887.

(z) *Ibid.*, at p. 190.

(a) Now s. 30 of the Bankruptcy Act, 1914 ; 1 Halsbury's Statutes 636.

which the goods (machinery) were placed in such a way as to cause them to become affixed to the freehold), suffered the mortgagees to enter into possession of the premises and seize the machinery. The owner has been held entitled to prove for the value of the machinery so lost, as well as for the instalments of rent in arrear, but there is no High Court decision to the same effect reported.

May be rebutted by Custom.—Reputation of ownership may be rebutted by proof of a custom to the contrary. This subject is dealt with at length, when treating of the analogous ss. in the Law of Distress Amendment Act, 1908 (b), and will not be further discussed here.

Debts Due and Growing Due.—For a discussion of the meaning of the words “debts due or growing due” see Chapter 3, p. 117.

Contract induced by Fraud.—It was decided in *Ex parte Ward, Re Eastgate* (c), that a vendor who is induced by the fraud of the purchaser to sell goods is, on discovering the fraud, entitled to disaffirm the sale and recover the goods, if he does so within a reasonable time, even though he does so with notice of an act of bankruptcy, on which the purchaser is subsequently adjudicated bankrupt, and in *Tilley v. Bowman, Limited* (d), it was decided that in such a case the vendor might rescind even after the date of the receiving order. In such cases the trustee has no higher title than the bankrupt. There would appear to be no reason on principle why this rule should not be applicable to contracts for hiring and hire-purchase induced by fraud.

SECTION 2—ASSIGNMENT FOR THE BENEFIT OF CREDITORS

Benefit of Creditors.—If the hirer includes in an assignment for the benefit of creditors, goods of which he is in possession under a hire-purchase agreement, (which does not amount to an agreement to buy as in

(b) *Vide* Chap. 6, p. 191.

(c) [1905] 1 K.B. 465; 5 Digest 687, 6075.

(d) [1910] 1 K.B. 745; 5 Digest 638, 5736.

Lee v. Butler (e), but is in the ordinary form as in *Helby v. Matthews* (f), the trustee acquires no title as against the owner of the goods though he received no notice of the transaction (g). It must, however, be borne in mind that such an assignment is in itself an act of bankruptcy, and if, in fact, a bankruptcy subsequently supervenes, the goods may come within the reputed ownership clause, as discussed in the foregoing pages (h).

SECTION 3—PROTECTION OF OFFICIAL RECEIVER AND TRUSTEE IN BANKRUPTCY

It will be useful to set out in full here the provisions of section 61 of the Bankruptcy Act, 1914 (i), which provides protection in certain circumstances for official receivers and trustees who have seized or disposed of goods which are not the property of the debtor. This would cover cases of goods let on hire or hire-purchase to the debtor, provided that they were not in the hirer's reputed ownership.

“61. Where the official receiver or trustee has seized or disposed of any goods, chattels, property or other effects in the possession or on the premises of a debtor against whom a receiving order has been made, without notice of any claim by any person in respect of the same, and it is thereafter made to appear that the said goods, chattels, property or other effects were not, at the date of the receiving order, the property of the debtor, the official receiver or trustee shall not be personally liable for any loss or damage arising from such seizure or disposal sustained by any person claiming such property nor for the costs of any proceedings taken to establish a claim thereto unless the Court is of opinion that the official receiver or trustee has been guilty of negligence in respect of the same.”

(e) [1893] 2 Q.B. 318; 3 Digest 92, 241.

(f) [1895] A.C. 471; 3 Digest 471; 3 Digest 93, 245.

(g) *Kitto v. Bilbie, Hobson & Co.* (1895), 11 T.L.R. 214; 5 Digest 1091, 8920.

(h) Bankruptcy Act, 1914, ss. 1 (1) (a), 37, 38; 1 Halsbury's Statutes 600, 642, 643.

(i) 1 Halsbury's Statutes 662.

CHAPTER 5

FIXTURES

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SECTION 1—GENERALLY

Fixtures.—It is a matter of importance to all concerned in the hiring or hire-purchase of those kinds of articles which are usually used after being attached to premises in some way, *e.g.*, machinery, and to the landlord and mortgagee of premises where they are placed, to appreciate the effect upon the power to remove them, that may be caused by thus attaching them. Questions are continually arising upon this point, which will be considered in this chapter from two aspects—(a) as between the landlord and the owner of goods let to the tenant, and (b) as between the mortgagee of the hirer and the owner of the goods let to the hirer.

There are two basic rules which govern the whole problem, *viz*: (a) that whatever is fixed to the freehold becomes part of the freehold or inheritance, or as the old maxim puts it, *quicquid plantatur solo, solo cedit*; and (b) that whatever once becomes part of the inheritance cannot be severed by a limited owner, without commission of waste (a).

(a) *Bain v. Brand* (1876), 1 App. Cas. 762, H.L.; 31 Digest 182, 3165.

There are a number of exceptions to the second rule which will be dealt with later.

In determining whether an article is a fixture or not, regard must be had to the manner and object of the attachment (*b*).

It is not sufficient that there should be mere juxtaposition (*c*), but there must be some form of attachment. For instance, cisterns and other articles standing merely by their own weight, even if they sink into the ground are not fixtures (*d*), unless it can be shown affirmatively that they were intended to be part of the land (*e*).

“ Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were intended lying on those who assert that they have ceased to be the chattels, and that on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend it is a chattel ” (*f*).

But the intention must be inferred from circumstances which are patent for all to see, and not from *e.g.*, the fact that the articles are the subject matter of a hire-purchase agreement between the mortgagor and the true owner, of which the mortgagee had no knowledge (*g*). Indeed, it

(*b*) *Holland v. Hodgson* (1872), L.R. 7 C.P. 328, Ex. Ch. ; 31 Digest 188, 3225.

(*c*) *Bain v. Brand* (*supra*).

(*d*) *Mather v. Fraser* (1856), 2 K. & J. 536 ; 31 Digest 183, 3170 ; *Wood v. Hewett* (1846), 8 Q.B. 913 ; 31 Digest 185, 3187. *Re Richards, Ex parte Astbury, Ex parte Lloyd's Banking Co.* (1869), 4 Ch. App. 630, 638 ; 31 Digest 193, 3292. See the curious distinction between tramway lines merely laid on sleepers which have sunk into the ground, and railway lines laid in ballast, in *Turner v. Cameron* (1870), L.R. 5 Q.B. 306, 311 ; 31 Digest 193, 3293, and *Beaufort v. Bates* (1862), 3 De G. F. & J. 381, C.A. ; 31 Digest 207, 3477.

(*e*) *Holland v. Hodgson* (*supra*).

(*f*) *Holland v. Hodgson* (*supra*), *per* Lord Blackburn, at p. 335.

(*g*) *Hobson v. Gorringe*, [1897] 1 Ch. 182 ; 31 Digest 187, 3224.

would appear that the intention is really to be inferred mainly from the degree and object of the annexation (*h*).

Where an article has been attached to the land and cannot be removed without serious injury to the soil and premises, it is a fixture, and the object of the attachment is irrelevant (*i*), but the difficulty arises in cases in which, although there is some attachment, the article can be removed without any great damage to the land or buildings; then it is a fixture, if the attachment is intended to be permanent or to make the buildings or land more valuable for the particular purpose for which it is used, or as it is sometimes put, the better enjoyment of the estate (*j*).

It is not a fixture, if it is attached for a temporary purpose only and for its more convenient use as a chattel, or if it is not necessary for the manufacture carried out on the premises (*k*).

Although the rule laid down above appears to be well established by the numerous decisions cited, Court times exceedingly difficult to understand how the case came to apply the rule to the facts in any particular case.

(*h*) *Hobson v. Gorringe* (*supra*) at p. 193, and see *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; 31 Digest 196, 3325. But see the contrasted cases of *Lyon & Co. v. London City & Midland Bank*, [1903] 2 K.B. 135; 31 Digest 188, 3233, and *Vaudeville Electric Cinema, Ltd. v. Muriset*, [1923] 2 Ch. 74; 35 Digest 307, 550, in the first of which tip-up chairs fastened to the floor by screws were held not to be fixtures whereas in the second, similar chairs fixed in a similar way were held to be fixtures, the only fact leading to the distinction being that in the first the chairs were hired for a short period with an option of purchase and in the second were owned by the person affixing.

(*i*) *Wake v. Hall* (1883), 8 App. Cas. 195; 31 Digest 205, 3464.

(*j*) *Wiltshire v. Cottrell* (1853), 1 E. & B. 674; 31 Digest 184, 3183; *Mather v. Fraser* (1856), 2 K. & J. 536; 31 Digest 183, 3170; *Walmsley v. Milne* (1859), 7 C.B.N.S. 115; 31 Digest 190, 3252; *Climie v. Wood* (1868), L.R. 3 Ex. 257; 31 Digest 182, 3164; *Longbottom v. Berry* (1869), L.R. 5 Q.B. 123; 31 Digest 191, 3256; *Hobson v. Gorringe*, [1897] 1 Ch. 182, C.A.; 31 Digest 187, 3224; *Crossley Brothers, Ltd. v. Lee*, [1908] 1 K.B. 86; 31 Digest 193, 3286; *Horwich v. Symond* (1915), 84 L.J. K.B. 1083, C.A.; 31 Digest 189, 3234; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97; 31 Digest 196, 3325.

(*k*) *Parsons v. Hind* (1866), 14 W.R. 860; 31 Digest 189, 3240; *Chamberlayne v. Collins* (1894), 70 L.T. 217, C.A.; 31 Digest 190, 3250.

Further, it has been decided, that the attachment of a chattel is to be regarded as permanent if it is apparently intended to be attached for the whole of a tenant's term (*l*), and from an examination of the cases cited above it will be observed that, although in many instances one of the obvious reasons for attaching an article may be to steady it, yet, if the article is an essential feature of the land or building when used for its intended purpose, *e.g.*, as a factory, the article is regarded as being an improvement on the land or building and as being a fixture in consequence.

Further, when an article such as machinery is affixed to premises and the machinery contains many parts, some of which are easily removable, yet, if the part removable is an essential part of the machinery, it is also a fixture (*m*).

Trade Fixtures and Ornaments.—Exceptions have arisen in the course of time to the second of the two rules mentioned at the beginning of this chapter, *viz*: that a limited owner may not sever what has become part of the inheritance without commission of waste, and now a lessee is entitled to sever articles which have been affixed for the purpose of trade or ornament, and remove them (*n*), unless, of course, there is an express agreement to the contrary (*o*).

These are generally known as "tenant's fixtures." It

(*l*) *Boyd v. Shorrocks* (1867), L.R. 5 Eq. 72; 31 Digest 189, 3235; *Holland v. Hodgson* (1872), L.R. 7 C.P. 328, 337, Ex. Ch.; 31 Digest 188, 3225.

(*m*) *Mather v. Fraser* (*supra*); *Place v. Fagg* (1829), 4 Man. & Ry. K.B. 277; 31 Digest 185, 3196; *Metropolitan Counties, etc., Society v. Brown* (1859), 26 Beav. 454; 31 Digest 186, 3203; *Sheffield & South Yorkshire Permanent Benefit Building Society v. Harrison* (1884), 15 Q.B.D. 358, C.A.; 31 Digest 186, 3204.

(*n*) *Poole's Case* (1703), 1 Salk. 368; 31 Digest 193, 3294; *Dudley v. Warde* (1751), Amb. 113; 31 Digest 193, 3295; *Elwes v. Maw* (1802), 3 East, 38; 31 Digest 194, 3299; *Gibson v. Hammersmith & City Railway Co.* (1863), 2 Drew. & Sm. 603; 31 Digest 194, 3300; *Horwich v. Symond* (1914), 110 L.T. 1016; affirmed (1915), 84 L.J. K.B. 1083, C.A.; 31 Digest 189, 3234.

(*o*) *Stansfeld v. Portsmouth Corporation* (1858), 4 C.B.N.S. 120; 31 Digest 204, 3446.

is to be borne in mind, however, that even where the article belongs to a class in respect of which there is a right in the tenant to sever, it remains part of the freehold and the property of the freeholder until so severed (*p*), and is not a chattel in respect of which trover may be maintained (*q*). Fixtures cannot be distrained upon by a landlord for rent in arrear (*r*).

It may be well to deal with the above exceptions to the general rule in a little more detail, but reference should be made to textbooks on landlord and tenant for more exhaustive particulars.

Trade Fixtures.—The exception in favour of fixtures erected for trade purposes, has arisen for reasons of public policy in order to encourage tenants to lay out capital on improvements of the landlord and extension of trade.

The right to remove arises whenever the following circumstances are present :—

- (a) The article was attached to the freehold for the purposes of trade.
- (b) The removal is not contrary to a stipulation in the lease or the custom of the country (*s*).
- (c) The article is of a chattel character before and after erection and does not lose that character by removal (*t*).
- (d) The removal can be effected without material damage to the freehold (*u*).

A great many articles come within the exception, even buildings, and the following among many others have

(*p*) *Lee v. Risdon* (1816), 7 Taunt. 188; 31 Digest 200, 3409.

(*q*) *Mackintosh v. Trotter* (1838), 3 M. & W. 184; 31 Digest 202, 3434; *Roffey v. Henderson* (1851), 17 Q.B. 574; 31 Digest 206, 3465.

(*r*) *Dalton v. Whitfern* (1842), 3 Q.B. 961; 31 Digest 212, 3518; *Crossley Bros., Ltd. v. Lee*, [1908] 1 K.B. 86; 31 Digest 193, 3286; *Becke v. Riebold* (1913), 30 T.L.R. 141; 18 Digest 386, 1260; see *post*, Chap. 6, p. 200.

(*s*) *Davis v. Jones* (1818), 2 B. & Ald. 165; 31 Digest 212, 3514.

(*t*) *Fisher v. Dixon* (1845), 12 Cl. & F. 312; 38 Digest 663, 70.

(*u*) *Avery v. Cheslyn* (1835), 3 Ad. & El. 75; 31 Digest 205, 3455; *Pole-Carew v. Western Counties & General Manure Co.*, [1920] 2 Ch. 97, C.A.; 31 Digest 196, 3325.

been held removable, *e.g.*, fire engines and steam engines (*v*), vats and coppers for soap boiling (*w*), cider mills (*x*), erections of wood on brick foundations (*y*), salt pans (*z*), glasshouses of nurserymen (*a*).

Fixtures for Ornament and Convenience.—This is a more limited exception than the last, and seems to have been allowed to creep in to counteract the great inconvenience to tenants that arose by reason of every slight attachment, even of their household furniture, to the structure of the house, resulting in the loss of their property.

Articles attached not merely for temporary purposes, but as a permanent improvement, cannot be removed, and there is a similar restriction to that in respect of trade fixtures, that the removal must be made without serious damage to the freehold (*b*).

A great variety of articles have been held removable under this heading, *e.g.*, hangings and tapestry (*c*), stoves and grates (*d*), carpets (*e*), furnaces and coppers (*f*), bookcases screwed to walls (*g*).

The tenant's right to sever trade and ornamental fixtures is effective only if the article can be removed (*h*), and it is in fact removed, during the existence of the term (*i*). This latter rule applies even where there is a forfeiture (*j*) or a surrender by the tenant with a view to

(*v*) *Ward v. Dudley* (1887), 57 L.T. 20 ; 34 Digest 613, 115.

(*w*) *Poole's Case* (1703), 1 Salk. 368 ; 31 Digest 193, 3294.

(*x*) *Lawton v. Lawton* (1743), 3 Atk. 13 ; 31 Digest 195, 3313.

(*y*) *Penton v. Robart* (1801), 2 East, 88 ; 31 Digest 194, 3298.

(*z*) *Mansfield v. Blackburne* (1840), 6 Bing. N.C. 426 ; 31 Digest 209, 3490.

(*a*) *Mears v. Callender*, [1901] 2 Ch. 388 ; 31 Digest 209, 3488.

(*b*) See cases cited in note (*u*), *supra*.

(*c*) *Squier v. Mayer* (1701), Freem. Ch. 249 ; 38 Digest 663, 67.

(*d*) *Lee v. Risdon* (*supra*).

(*e*) *Hellawell v. Eastwood* (1851), 6 Ex. 295 ; 31 Digest 187, 3211.

(*f*) *Squier v. Mayer* (*supra*).

(*g*) *Birch v. Dawson* (1834), 2 Ad. & El. 37 ; 44 Digest 714, 5615.

(*h*) *Avery v. Cheslyn* (*supra*) ; *Pole-Carew v. Western Counties & General Manure Co.* (*supra*).

(*i*) *Poole's Case* (*supra*) ; *Dudley v. Warde* (*supra*) ; *Elwes v. Maw* (*supra*) ; *Lyde v. Russell* (1830), 1 B. & Ad. 394 ; 31 Digest 198, 3370 ; *Gibson v. Hammersmith & City Railway Co.* (*supra*).

(*j*) *Pugh v. Arton* (1869), L.R. 3 Eq. 626 ; 31 Digest 201, 3420.

entering upon a new lease (*k*)—the tenant loses his right to remove the fixtures.

But if the tenancy is of uncertain duration, then the tenant has a reasonable time after determination thereof in which to remove them (*l*). And he is also entitled to remove them during the time he remains in possession under circumstances that entitle him to think he is a tenant (*m*).

In the case of a surrender (*n*) or forfeiture (*o*), a mortgagee (*o*) or purchaser (*p*) of fixtures from the tenant, has a reasonable time after the surrender or forfeiture in which to remove them (*q*).

Fixtures for Agricultural Purposes.—In addition to the two main exceptions already mentioned, there is a third which is a creature of the Statute Law. By section 22 of the Agricultural Holdings Act, 1923 (*r*) consolidating previous enactments, a tenant of land to which the act applies is given a right of property in fixtures, such as engines, machinery or fencing affixed by him for agricultural purposes, and a right of removal under certain conditions laid down in the Act.

SECTION 2—AS BETWEEN OWNER OF HIRED GOODS AND HIRER'S LANDLORD

The owner of goods let to a tenant under a hiring or hire-purchase agreement and affixed to the premises, is in a much less favourable position, than a purchaser from the tenant of the tenant's own property, so affixed.

(*k*) *Leschallas v. Woolf*, [1908] 1 Ch. 641; 31 Digest 210, 3498.

(*l*) *Oakley v. Monck* (1866), L.R. 1 Exch. 159, 164, Ex. Ch.; 31 Digest 60, 2069; *Re Roberts, Ex parte Brook* (1878), 10 Ch. D. 100, 109, C.A.; 31 Digest 203, 3440.

(*m*) *Weeton v. Woodcock* (1840), 7 M. & W. 14, 19; 31 Digest 203, 3435.

(*n*) *London & Westminster Loan & Discount Co. v. Drake* (1859), 6 C.B. N.S. 798; 31 Digest 203, 3438.

(*o*) *Re Glasdir Copper Works, Limited*, [1904] 1 Ch. 819; 31 Digest 204, 3454.

(*p*) *Stansfeld v. Portsmouth Corporation* (1858), 4 C.B.N.S. 120; 31 Digest 204, 3446.

(*q*) *Moss v. James* (1878), 38 L.T. 595, C.A.; 31 Digest 201, 3426.

(*r*) 1 Halsbury's Statutes 97.

In *British Economical Lamp Co. v. Empire, Mile End* (s), the plaintiffs let electric light filament lamps on hire to the lessee of a theatre. The lamps were affixed to their brackets by a bayonet attachment in common use for this purpose. The lessors and owners of the theatre, who were the defendants in the action, re-entered for non-payment of rent, and although the lamps were still on the premises, no demand was made by the plaintiffs to the defendants for their return either then or for a month afterwards. Later, the plaintiffs demanded the return of the lamps, and being unable to obtain them, brought an action of detinue. It was held by the Recorder, in the Mayor's Court, that the plaintiffs were not entitled to recover on the ground that the lamps were fixtures. This decision, on appeal to a Divisional Court, was upheld, but on different grounds. Lush, J., held that the lamps were not fixtures but chattels; A. T. Lawrence, J., without expressing any definite view, appeared to think they were fixtures, but both agreed that the plaintiffs had no cause of action against the defendants for refusing to allow them to enter on the premises and remove the lamps. Lush, J., however, suggested that if there had been any evidence of an assertion by the defendants, that the lamps were their property and of a dealing with them as such, then that would have been a conversion, but that there was no evidence of that.

This decision has unsatisfactory features.

One would have thought in the first place that a refusal to deliver up goods in the defendants' possession, on demand, was sufficient evidence of conversion, if those goods were chattels. If, on the other hand, they were fixtures, then purchasers from a tenant are in a better position than owners with whom the tenant is under contract to allow them to remove the goods, since the former are allowed a reasonable time within which to remove the articles (t).

As the law stands at present, however, this appears to be the position and the owner's best hope of saving his

(s) (1913), 29 T.L.R. 386; 31 Digest 186, 3205.

(t) *Re Glasdair Copper Works, Limited* (supra); *Stansfeld v. Portsmouth Corporation* (supra).

goods would appear to be to induce the landlord to assent to the hiring agreement and to the owner's right of removal within a reasonable time of determination of the tenancy (*u*).

It should be pointed out, that it has been decided that a tenant of a mortgagor is entitled to remove his tenant's fixtures as against his landlord's mortgagee, who has entered under the mortgage (*v*), so long as he removes them during the currency of his tenancy (*w*), but he cannot enforce against the mortgagee in possession, an agreement made with his landlord—the mortgagor—that he shall be entitled to remove them after the termination of the tenancy (*x*).

SECTION 3—AS BETWEEN THE MORTGAGEE OF THE HIRER AND THE OWNER OF HIRED GOODS

As between a mortgagor and a mortgagee, the general rule referred to at the beginning of this chapter, applies in all strictness, and fixtures become subject to the security, whether the security is a legal or equitable one (*y*), and whether the goods were affixed before (*z*) or after (*a*) the security was given. If, however, the mortgagor is a trader and goods for the purpose of his trade or business have been affixed to the premises under a hiring or a hire-purchase-agreement, a number of considerations arise, such as whether the security is legal or equitable, whether the mortgagee had notice of the hiring agreement, whether the hiring agreement preceded the mortgage, and whether the mortgagee has taken possession.

When the mortgagee has once taken possession, at any rate under a legal mortgage, whether the chattels became affixed before or after the creation of the security, and

(*u*) See *Gough v. Wood*, [1894], 1 Q.B. 713 ; 31 Digest 212, 3513.

(*v*) *Sanders v. Davis* (1885), 15 Q.B.D. 218 ; 35 Digest 310, 569.

(*w*) *Thomas v. Jennings* (1896), 66 L.J. Q.B. 5 ; 31 Digest 213, 3521.

(*x*) *Ibid.*

(*y*) *Meux v. Jacobs* (1875), L.R. 7 H.L. 481 ; 31 Digest 206, 3471.

(*z*) *Mather v. Fraser* (1856), 2 K. & J. 536 ; 31 Digest 183, 3170.

(*a*) *Longbottom v. Berry* (1869), L.R. 5 Q.B. 123 ; 31 Digest 191, 3256.

whether with or without the knowledge of the mortgagee, the fixtures pass to the mortgagee and the previous owner is not entitled to recover them (b).

If, however, the mortgagee can be taken to have authorised the removal of the articles, then the owner will be entitled to remove them, if he does so before the mortgagee takes possession (c), but not after, as any licence to remove will be terminated by the fact of taking possession (d).

Whether or not the mortgagee has impliedly authorised the erection and removal of fixtures, is a question of fact depending upon all the circumstances of the case, but any implication to that effect will be displaced by an express covenant by the mortgagor not to remove (e).

If the security of the mortgagee is an equitable one and arose subsequently to the hiring agreement, the latter will take priority of the former, as both are considered to be equitable interests in the premises and the prior in time will prevail and the owner of hired goods will in such cases be entitled to recover his goods (f), apparently even where a receiver has been appointed by the holder of the security and has entered (g).

It may, perhaps, be convenient to examine the cases establishing the propositions with a little care, as they are of great importance in relation to the subject matter of this book.

(b) *Hobson v. Gorringe*, [1897] 1 Ch. 182, C.A. ; 31 Digest 187, 3224 ; *Reynolds v. Ashby*, [1904] A.C. 466 ; 35 Digest 309, 565 ; *Ellis v. Glover & Hobson, Limited*, [1908] 1 K.B. 388 ; 35 Digest 320, 644.

(c) *Gough v. Wood*, [1894] 1 Q.B. 713 ; 35 Digest 309, 562, and see *Re Maryport Hematite Iron & Steel Co.*, [1892] 1 Ch. 415 ; 31 Digest 203, 3442 ; *Huddersfield Banking Co., Ltd. v. Lister (Henry) & Son, Limited*, [1895] 2 Ch. 273, C.A. ; 35 Digest 320, 645.

(d) *Ellis v. Glover & Hobson, Limited (supra)*.

(e) *Ibid.*

(f) *Re Allen (Samuel) & Sons, Limited*, [1907] 1 Ch. 575 ; 35 Digest 309, 567. *Re Morrison, Jones & Taylor, Limited*, [1914] 1 Ch. 50 ; 35 Digest 450, 1913.

(g) *Re Morrison, Jones & Taylor, Limited (supra)*.

In the case of *In re Maryport Hematite Iron & Steel Company* (*h*) the company who were lessees of a colliery, mortgaged it with all fixtures then and thereafter to be placed upon it to their bankers, the Cumberland Union Banking Company. Afterwards they entered into an agreement with some engine makers called the Luhrig Coal & Ore Dressing Appliances, Limited, for the erection of a machine, which was to be paid for by instalments and to remain the property of the makers until all the instalments were paid. The mortgagees had no notice of this agreement. The machine was erected and was in the nature of a trade fixture. After making two payments of instalments, the company failed to make any further payments, and some time afterwards the bankers brought an action to enforce their security and a receiver was appointed and took possession of the premises. The company then went into voluntary liquidation, and a supervision order was made.

It was held that the makers of the machine, *i.e.*, Luhrig Company, were entitled to remove it.

North, J., in the course of his judgment said, at p. 425 :

“ I think it was not in the power of the mortgagors to confer on their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them. The Maryport Company cannot be heard to say that the machinery in question is not the property of the Luhrig Company and the banking company do not stand in any better position.”

These words were unfavourably commented on, during the argument in *Hobson v. Gorringe* (*i*), by Lord Russell, C.J., who said, at p. 187, in the course of the argument : “ It is a question whether having regard to subsequent authorities that statement of the law is correct,” and in the judgment of the court delivered by A. L. Smith, L.J., it is said at p. 188 :—

“ There can be no doubt upon a mortgage in fee of the land, that, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the

(*h*) [1892] 1 Ch. 415 ; 31 Digest 203, 3442.

(*i*) [1897] 1 Ch. 182, at p. 187 ; 35 Digest 309, 563.

mortgage. If North, J., in the passage in his judgment which has been referred to in *Cumberland Union Banking Company v. Maryland Hematite Iron & Steel Company*, meant to hold otherwise in our opinion he was in error, but we doubt if he intended so to hold."

Kay, L.J., in *Gough v. Wood & Co. (j)*, says of these words:—

"But he (*i.e.*, North, J.) based his decision on the fact that the receiver was going to abandon the colliery. I do not understand the language of the learned judge in that case to mean that the fixtures could be removed without the consent of the mortgagees. The decision may be supported on the ground of an implied assent by them. If it means that the fixtures could be removed without such implied assent, I should respectfully differ from that view."

It is to be noted that in the *Maryland* case it was not a mortgage in fee but a mortgage, of a term of years. The lessor had not entered and the mortgagees were asking for leave to the abandon the premises, taking the fixtures with them. The mortgagees, however, had entered and thereupon took whatever interest the lessees had in the fixed machinery. As these were trade articles the lessee would, during the continuation of the term, be entitled to remove them and one would have imagined that this right would have passed to the mortgagees, but it is difficult to see on what ground the *Luhrig Company* could do so against the mortgagees, between whom and the company there was no privity of contract. It is doubtful whether this decision would now be followed.

In *Gough v. Wood & Co. (k)*, Edmonds, a nurseryman, was tenant for a term of years of one, Moon. The defendants, who were engineers, agreed by an agreement in writing but not under seal, dated 1st November, 1889, to erect some hot water apparatus to be hired to Edmonds and paid for by quarterly instalments. It was agreed

(j) [1894] 1 Q.B. 713, at p. 724; 35 Digest 309, 562.

(k) [1894] 1 Q.B. 713; 35 Digest 309, 562.

that the apparatus was to remain the property of Wood & Company until the last payment required to make up the sum of £96 19s. od. was made, and they were to have power to enter and remove it in default of payment, Moon concurring in the agreement for the purpose of giving them power to enter and remove. On the 12th November, 1889, Edmonds by deed mortgaged his leasehold interest in the land by underlease to the plaintiff to secure £100, without notice of the hire-purchase agreement, and the plaintiff allowed Edmonds to remain in possession. Later, between December, 1889, and January, 1890, the apparatus was actually fixed and bricked and cemented in. Edmonds made some payments after the erection of the machinery but later defaulted and was adjudicated bankrupt on 20th August, 1892, before all the instalments were paid. On the 14th October, 1892, the defendants entered on the land and removed the machinery before the mortgagees had entered into possession and later the plaintiff sued the defendants for the removal of the boiler and pipes.

It was held that the plaintiff, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing the machinery and that he was not entitled to succeed.

Lindley, L.J., at p. 720, says :—

“ By leaving the mortgagor in possession, the mortgagee impliedly authorised him to carry on his business and to sell and remove the plants, trees and shrubs which though fixed to the soil, constituted his stock-in-trade. This implied authority can hardly be confined to such things but may fairly be regarded and I think ought to be regarded, as authorising the mortgagor whilst in possession to hire and bring and fix other fixtures necessary for his business and to agree with their owner that he shall be at liberty to remove them at the end of the time for which they are hired. Unless this be so, persons dealing *bona fide* with mortgagors in possession will be exposed to very unreasonable risk ; and honest business with them will be seriously impeded. This implied authority and the fact that the hot-water apparatus was not the property of the mortgagor are the important features of this case,

and are, in my opinion, sufficient to protect the defendants from the claim of the plaintiff. Whether Wood & Company could have removed the apparatus if it had been put up before the mortgage to the plaintiff, or if the plaintiff had taken possession before removal, are questions which it is unnecessary to decide, and on which I express no opinion. In such a case as the present the mortgagee's security is neither better nor worse than when he took it, and no injury is inflicted on him."

In *Hobson v. Gorringe* (l), the plaintiff let to one, King, on a hire-purchase agreement, a gas-engine, on terms that it was not to become King's property until all the instalments were paid and was removable by the plaintiff, on default in payment of any instalment. It was affixed in such a way as to constitute it a trade fixture. Subsequently, by deed, King mortgaged the land and fixtures in fee to the defendant to secure £600 in all, and later became bankrupt and Gorringe entered and took possession of the land and engine. It was held that Hobson was not entitled to recover the engine or the proceeds of its sale. A. L. Smith, L.J., in delivering the judgment of the Court, said at p. 189 :—

" Even if in the present case a licence had been granted by Gorringe to King to remove the gas engine during the continuance of a term, neither of which conditions in fact existed, Gorringe, by entering and taking possession of the land and engine would have determined such licence.

" It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture, *i.e.*, part of the soil—when it was annexed to the soil by screws and bolts, subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the stipulated monthly instalments. In our opinion, the engine became a fixture, *i.e.*, part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an

(l) [1897] 1 Ch. 182 ; 35 Digest 309, 563.

easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate."

Hobson v. Gorringe was followed and approved in 1904 by *Reynolds v. Ashby & Son (m)*, which was a decision of the House of Lords, and the next case of importance on the subject is *Ellis v. Glover & Hobson, Limited (n)*.

In this case, one Leadley by deed mortgaged his premises and the fixtures then and thereafter to be fixed thereon to the plaintiff to secure £400, and the deed contained a covenant not to "remove any of the things hereby granted and conveyed from the premises without the written consent" of the plaintiff. Later, Leadley entered into a hire-purchase agreement in writing with the defendants for the erection of machinery on the premises, to be paid for by instalments, the property not to pass to Leadley until all the instalments had been paid, with leave to the defendants to enter and remove the machinery on the default of the hirer. There is nothing in the report to indicate whether the mortgagee was informed of the hire-purchase agreement.

The machinery was erected in such a manner as to become a fixture. Later the hirer being in arrear the defendants entered and removed it.

It was held that the machinery has passed to the mortgagee with the freehold and in an action by the plaintiff to recover the machinery or its value from the defendants, he was entitled to succeed. The case was distinguished from *Gough v. Wood (o)* on the ground that

(m) [1904] A.C. 466; 35 Digest 309, 565.

(n) [1908] 1 K.B. 388; 35 Digest 320, 644.

(o) *supra*.

the mortgagee could not in this case be presumed to have acquiesced in the erection and removal of the fixtures, as any such implied acquiescence was displaced by the express covenant not to remove.

In the case of *In re Samuel Allen & Sons, Limited* (p), the company obtained under a hire-purchase agreement certain machinery from a firm called Lee & Hunt, and it was erected in such a way as to be a fixture on the company's premises. In default of payment of any instalment, Lee & Hunt were entitled to enter and remove the machinery. Subsequently, the company deposited the deeds relating to the premises with its bank to secure a current account, and the bank took without knowledge of the hire-purchase agreement. The company defaulted in its payment of instalments and a winding up order was made against it.

It was held that Lee & Hunt were entitled to the proceeds of the sale of the machinery (which had been sold by the official receiver by arrangement), and not the bank, as the latter being merely an equitable mortgagee and Lee & Hunt having an equitable interest in the land by their hire-purchase agreement relating to the machinery affixed thereto, the latter, being earlier in point of time, had priority over the interest of the bank.

This case was followed and apparently even extended in the case of *In re Morrison, Jones & Taylor, Limited* (q), where the equitable mortgagees, certain debenture holders who had no notice of the hire-purchase agreement, had actually appointed a receiver and manager who had entered into possession of the property; it was decided, nevertheless, that the owners of the machinery were entitled to enter on the premises and remove it. The agreement appears to have been what has been described as a *Lee v. Butler* agreement, i.e., it was an agreement to buy by instalments, the property not to pass until the

(p) [1907] 1 Ch. 575; 35 Digest 450, 1911.

(q) [1914] 1 Ch. 50; 35 Digest 450, 1913, and see *Hamer v. London City and Midland Bank, Limited* (1918), 118 L.T. 571; 10 Digest 756, 4726.

last instalment had been paid, and leave was given to the owners to enter on default. Cozens-Hardy, M.R., in the course of his judgment, at p. 58, said :—

“ Now what was the nature of the agreement (*i.e.*, the hire-purchase agreement) and what was its effect in point of law ? In my opinion it was an agreement by which there was an equitable interest in this part of the freehold property conferred in the events which have happened upon the contractors (*i.e.*, the owners), a right to go and enter and to take and remove this part of the freehold.”

CHAPTER 6

THIRD PARTY DEALINGS WITH THE GOODS

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THE principal difficulties which arise upon hiring and hire-purchase agreements are those which occur when persons, who are not in any way parties to the agreement, have intermeddled with the goods, whether by purchasing them, taking them in pawn or pledge, levying distress or execution upon them, purporting to claim a lien on them

in some capacity, *e.g.*, carrier, innkeeper or repairer, or dealing with them in a variety of other ways.

The following pages will be devoted to an examination of these various problems.

SECTION I—SALE OR PLEDGE BY HIRER

(A) SALE OR PLEDGE

If, during the currency of a hiring or hire-purchase agreement, the hirer sells or pledges the goods, the question may arise whether the owner can recover the goods or their value from the purchaser or pledgee. The answer to this question depends on the nature of the agreement between the owner and the hirer, and the effect of two comparatively recent enactments upon the Common Law.

By the Common Law no man could give to another a better title to goods than he had himself. This rule was later modified in the course of centuries by incorporating in it a rule of the Law Merchant to the effect that a sale in a public fair or market was protected, *i.e.*, a sale in *market overt* (a).

The Common Law position was lucidly stated in *Loeschman v. Machin* (b) to the following effect, *viz.* : that the general rule is that if a man buy goods or take them on pledge and they turn out to be the property of another, the owner has the right to take them out of the hands of the purchaser, except indeed in the case of a sale in *market overt*.

Even where the owner had voluntarily parted with possession of the goods by the contract of bailment (c),

(a) See *Clayton v. Le Roy*, [1911] 2 K.B. 1031 (33 Digest 562, 467), at p. 1038 *et seq.* for an illuminating judgment on this subject. For notes on *market overt* see *post*, p. 169.

(b) (1818), 2 Stark. 311; 43 Digest 491, 303.

(c) For full consideration of the subject of bailment see the leading case of *Coggs v. Bernard* (1703), 2 Ld. Raym. 909 and Smith's Leading Cases; 3 Digest 53, 7.

e.g., by letting them on hire, any act of the bailee entirely inconsistent with the terms of the bailment, such as selling (*d*) or pledging them (*e*), although it did not amount to a destruction of the chattel bailed, was regarded as a repudiation of the bailment by the bailee and put an end to the bailment, caused the right of possession of them to revert to the bailor, and entitled him to maintain an action of trover (*f*). Presumably the repudiation must be accepted by the true owner, although this aspect of the matter is not dealt with in the various cases, possibly because it was obvious from their conduct that the respective owners had accepted the repudiation (*g*).

This state of the law was found to result in many hard cases as mercantile usages become more complex, and was taken advantage of by fraudulent persons, and in consequence a remedy was sought in various enactments usually called the Factors Acts, which very considerably altered the Common Law position in favour of *bona fide* purchasers.

The only statutes which need detailed consideration to-day in this connection are the Factors Act, 1889, and the Sale of Goods Act, 1893.

By section 1, subsections (1) and (2) of the Factors Act, 1889 (*h*), it is provided as follows:—

1. For the purposes of this Act—

- (1) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of

(*d*) *Cooper v. Willomatt* (1845), 1 C.B. 672; 3 Digest 106, 316.

(*e*) *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37; 3 Digest 97, 265.

(*f*) *Fenn v. Bittleston* (1851), 7 Ex. 152; 3 Digest 106, 317; *Nyberg v. Handelaar*, [1892] 2 Q.B. 202; 3 Digest 111, 353; *Cooper v. Willomatt* (*supra*); *Singer v. Clark* (*supra*).

(*g*) See *ante*, p. 120 *et seq.* for a discussion of the question whether a sale or pledge by a hirer under a hire-purchase agreement which does not expressly forbid assignment by the hirer amounts to repudiation, and see *Whiteley v. Hill*, [1918] 2 K.B. 808; 3 Digest 107, 325; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K.B. 244; 3 Digest 93, 247.

(*h*) 1 Halsbury's Statutes 37; Appendix C, *post*, p. 323.

sale, or to buy goods, or to raise money on the security of goods.

- (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

Section 9 of the same Act (*i*) reads as follows :—

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

By the Sale of Goods Act, 1893, section 25, subsection (2) (*j*), it is provided :—

25. (2). Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods, or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

The only difference between the latter section and section 9 of the Factors Act, 1889, is the omission in section 25 of the Sale of Goods Act, 1893, of the words, “or under any agreement for sale, pledge, or other disposition thereof.”

(i) 1 Halsbury's Statutes 40 ; Appendix C, *post*, p. 325.

(j) 17 Halsbury's Statutes 626 ; *post*, p. 329.

It is also provided by the Factors Act, 1889, that where a mercantile agent has been with the consent of the owner in possession of goods or of documents of title to goods, any sale, pledge or other disposition which would have been valid during the consent, will still be valid although the consent has been determined, unless the person taking under the sale, etc., had notice of the determination of the consent (*k*) and the consent of the owner is to be presumed in the absence of evidence to the contrary (*l*).

These sections have been considered in a number of cases. In *Lee v. Butler* (*m*), the facts were as follows:—

On the 5th May, 1892, a certain Mrs. Lloyd agreed by a written hire-purchase agreement to take on hire certain furniture and to pay by way of rent therefor the sum of £1 on May 6th, 1892, and the sum of £96 4s. od., on August 1st, 1892. It was provided that if the rent were not paid within a week of the specified days, or if the hirer removed the goods from her address without leave, then it should be lawful for the owner to recover them and any moneys paid should be applied as rent and not as part payment of the goods. But if the hirer duly made the payments, the furniture should become her absolute property, but that until such payments were actually made, no property or interest in the furniture should vest in her. The agreement did not give the hirer any option or power to return the furniture. She contracted absolutely to pay the two sums mentioned. Before the payments were completed, Mrs. Lloyd sold and delivered the goods to the defendant Butler, who bought in good faith and without notice of the agreement. The plaintiff brought an action to recover the goods.

It was, however, decided that Mrs. Lloyd was a person

(*k*) Factors Act, 1889, s. 2 (3); 1 Halsbury's Statutes 39.

(*l*) *Ibid.*, s. 2 (4); Appendix C, *post*, p. 324.

(*m*) [1893] 2 Q.B. 318; 3 Digest 92, 241. See also *Hull Ropes v. Adams* (1895), 65 L.J. Q.B. 114; 3 Digest 92, 242; *Payne v. Wilson*, [1895] 1 Q.B. 653; 3 Digest 97, 264; *Thompson & Shackell v. Veale* (1896), 74 L.T. 130, C.A.; 3 Digest 93, 243; *Wylde v. Legge* (1901), 84 L.T. 121; 3 Digest 93, 244; *Brooks v. Beirnsstein*, [1909] 1 K.B. 98; 3 Digest 96, 258; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K.B. 244; 3 Digest 93, 247; *Grande Maison d'Automobiles v. Beresford* (1909), 25 T.L.R. 522; 3 Digest 93, 246; *Marien v. Whale*, [1917] 2 K.B. 480; 39 Digest 364, 57.

who had "agreed to buy" goods within section 9 of the Factors Act, 1889, and that Butler had, accordingly, acquired a good title. The Court concurred in the opinion that the Act had been passed to meet that very kind of case.

In the case of *Helby v. Matthews* (11) (which is the most frequently cited case in connection with hire-purchase and should be studied with care with reference to the topic now being discussed), the agreement differed in essential particulars.

The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments of 10s. 6d. It was provided that the hirer might terminate the hiring by delivering up the article to the owner, but in that case the hirer was to remain liable for all arrears of hire. It was, however, provided that if he paid the instalments until the sum of £18 18s. od. was paid, then the piano was to become his property, but until then it remained the property of the owner. (It is to be observed that the hirer did not agree to pay the sum of £18 18s. od.) Before the payment of all the instalments the hirer pawned the piano and the owner brought an action against the pawnbroker claiming its return.

It was decided that he was entitled to succeed; that the hirer was under no legal obligation to buy, but had merely an option to do so, and that in consequence he had not "agreed to buy goods" within the meaning of section 9 of the Factors Act, 1889, and the pawnbroker was not protected by the Act and was wrongfully detaining the piano from the true owners. In other words the Common Law position applied. The pawnbroker could get no better title than the hirer could give him and the hirer could give none. He had repudiated the agreement by pledging the piano, an act which entitled the owner to its immediate return and the pawnbroker could not be in any better position.

In the course of his judgment, Lord Herschell said (o) :

(n) [1895] A.C. 471 ; 3 Digest 93, 245.

(o) At p. 475.

“ My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement, Brewster had ‘ agreed to buy ’ the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All he undertook was to make the monthly payment of 10s. 6d., so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation.”

It will be seen that the effect of these two cases is to decide that where a hirer has bound himself to pay the whole of the purchase price, without any power of determining the hiring, whatever power the owner may have to do so, then it amounts to an “ agreement to buy ” within section 9 of the Factors Act, 1889 (*p*), and the hirer can give a good title to a *bona fide* purchaser without notice, whereas, where there is reserved to the hirer the right to put an end to the hiring, then there is no “ agreement to buy ” and the hirer cannot pass a valid title. This distinction has, of course, been recognised in the drafting of hire-purchase agreements and it is unusual in these days to come across what is known as a *Lee v. Butler* agreement.

Before leaving these two cases it will be convenient to consider the recent case of *Felston Tile Co. v. Winget, Ltd.* (*q*), although it was not concerned with the same point. The point in issue was, in substance, whether

(*p*) 1 Halsbury's Statutes 40 ; Appendix C, *post*, p. 325.

(*q*) [1936] 3 All E.R. 473 ; Digest Supp.

certain correspondence which passed between the parties before the making of a hire-purchase agreement and which excluded certain warranties should form part of the contract in addition to the hire-purchase agreement itself which did not exclude the warranties. It was held in the circumstances of the case that the correspondence formed part of the agreement. The Court, however, went on to decide that since the hire-purchase agreement was an irrevocable although conditional agreement to sell on the part of the owner, it was a contract for the sale of goods with the Sale of Goods Act, 1893, section 1 (r), and that therefore the statutory warranties and conditions under that Act would have been implied if they had not been excluded by the correspondence. The hire-purchase agreement was in quite ordinary form, substantially in the form in *Helby v. Matthews*, giving the hirer liberty to terminate the hiring at any time, and putting him under no obligation to buy. It is a little difficult therefore to understand how there could be an irrevocable agreement to sell, since an agreement to sell connotes an agreement to buy. It is submitted that the words of Lord Herschell, L.C., in *Helby v. Matthews* (s) are very much in point :—

“ It was said in the Court of Appeal that there was an agreement by the appellant to sell and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words ‘ agreement to sell ’ be used in their strict legal sense ; but when a person has for valuable consideration bound himself to sell to another on certain terms if the other chooses to avail himself of the binding offer, he may in popular language be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn certainly does not connote an agreement to buy and it is only in this sense that there can be said to have been an agreement to sell in the present case.”

Where, therefore, the hirer, who has agreed to buy,

(r) 17 Halsbury's Statutes 612 ; Appendix D, *post*, p. 331.

(s) [1895] A.C. 471, at p. 477 ; 3 Digest 93, 245.

sells the goods, they cannot be recovered by the owner from the purchaser if the purchaser has acted in good faith and without notice of the agreement between the hirer and the owner (*t*). Nor can the goods be recovered from a pawnbroker who takes them from such a person in good faith and without notice of the agreement between the hirer and the owner (*u*). If a hirer who has agreed to buy goods grants a bill of sale in respect of them and the grantee takes in good faith and without notice and afterwards the owner, because of default, takes possession of the goods from the hirer, the grantee of the bill of sale can recover the goods from the owner (*v*). A pledge of the goods by someone acting for the hirer under an agreement amounting to an agreement to buy may constitute the pledger a "mercantile agent" and defeat the owner. This was decided in a somewhat unsatisfactory case—*Strohmenger v. Attenborough* (*w*)—where a woman described as a "lodger," who was apparently living with the hirer, pledged the goods with a pawnbroker, and the judge in the County Court held that she was a mercantile agent. The Divisional Court refused to reverse the decision on the ground that this was a question of fact. It is difficult to see how the learned judge brought the lady within section 1 (1) of the Factors Act, 1889 (*x*).

Care should be taken when perusing the various decisions in cases decided during the course of the passage of the case of *Helby v. Matthews* from the lowest court to the House of Lords to ascertain after what stage in that passage the decision was given, as the cases frequently appear to state the law to the contrary in view of the final decision, overruling the Court of Appeal.

There are a number of decisions relating to these

(*t*) *Lee v. Butler* (*supra*).

(*u*) *Thompson & Shackell, Limited v. Veale* (*supra*).

(*v*) *Wylde v. Legge* (*supra*).

(*w*) (1894), 11 T.L.R. 7; 39 Digest 632, 2291.

(*x*) 1 Halsbury's Statutes 37; *post*, p. 323.

sections of the Factors Act, 1889, and the Sale of Goods Act (1893) which should be referred to.

A conditional agreement to buy, followed by a loan of the article to the person who has conditionally agreed to buy, enables that person to pass a good title under section 25, subsection (2) of the Sale of Goods Act, 1893 (y), but a person who obtains goods "on sale or return" is not in possession within the meaning of the section (z).

The words "consent of seller" were considered in *Cahn v. Pockett's, etc. Steam Packet Co.* (a), where one, Pintscher, having agreed to buy from Steinmann & Co. 10 tons of copper c.i.f., on receipt of the bill of lading and draft, did not accept the draft, being insolvent, but transferred the bill of lading to the plaintiffs to whom he had sold a similar amount of copper, and received the price from them. Steinmann & Co., hearing of Pintscher's insolvency stopped the copper *in transitu* and the plaintiffs then sued the shipowners for non-delivery of the copper. It was held that Pintscher had obtained the bill of lading with the consent of the seller, Steinmann & Co., and could pass a valid title thereto to the plaintiffs (b).

It is necessary now to consider the following sections of the Factors Act, 1889, and Sale of Goods Act, 1893, by reason of two recent and important cases.

Section 2, subsection (1) of the Factors Act provides :—

"Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts

(y) 17 Halsbury's Statutes 626 ; *post*, p. 339 and see *Marten v. Whale*, [1917] 2 K.B. 480 ; 39 Digest 364, 51.

(z) *Edwards (Percy), Ltd. v. Vaughan* (1910), 26 T.L.R. 545 ; 39 Digest 507, 1251.

(a) [1899] 1 Q.B. 643 ; 39 Digest 519, 1352.

(b) And see *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K.B. 50 ; 1 Digest 335, 495 ; *Mehta v. Sutton* (1913), 109 L.T. 529 ; 1 Digest 333, 482.

in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Section 8 of the same Act provides :—

" Where a person having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale pledge or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

Section 25, subsection (1) of the Sale of Goods Act, 1893, is in the same terms as section 8 of the Factors Act, 1889, except that the words " or under any agreement for sale, pledge or other disposition thereof " are omitted. In *Staffs Motor Guarantee, Limited v. British Wagon Co., Ltd.* (c), a man called Heap, a dealer in motor vehicles, entered into a transaction for the sale of a lorry to the defendants, a finance company, and for the letting of the lorry to Heap under a hire-purchase agreement. The lorry never left the physical possession of Heap. Heap then fraudulently sold the lorry to the plaintiffs, who were not aware of the previous transaction. The payments by Heap to the defendants having fallen into arrears, the defendants seized the lorry and refused to deliver it to the plaintiffs who then sued the defendants in detinue and conversion. It was held that the transaction between Heap and the defendants was on the facts *bona fide*: that Heap after the making of the hire-purchase agreement was not in possession of the lorry as " a mercantile agent " within the meaning of the Factors Act, 1889, section 2 (1), but as a bailee, and therefore could not give the plaintiffs

(c) [1934] 2 K.B. 305 ; Digest Supp.

a good title by that section (d) ; held further that after the hire-purchase agreement was entered into, Heap was not in possession of the lorry as a person who " having sold goods, continues or is in possession of the goods within section 25 (1) of the Sale of Goods Act, 1893, but as a bailee, and therefore the delivery or transfer by him of the lorry under the sale to the plaintiffs had not, by virtue of that section, the same effect as though the defendants had authorised the sale (e).

A different result was arrived at in the case of *Union Transport Finance, Ltd. v. Ballardie* (f). In that case the branch manager of the plaintiffs, a finance company, purchased in May, 1935, a car from a man named Clark and then let it under a hire-purchase agreement to an employee of Clark's, a young man called Felton, who was not in a position to buy or hire a car on any terms. This was a colourable transaction. The car in fact remained in the possession of Clark who made certain payments under the agreement to the plaintiffs. In August, 1935, Clark hired the car under another hire-purchase agreement to the defendant, who received the car in good faith and without notice of the previous transaction. In an action brought by the plaintiffs to recover the vehicle, the defendant relied on section 8 of the Factors Act, 1889. It was held that he was entitled to succeed. The distinction no doubt is that in the last case the first hire-purchase agreement was colourable and a mere nullity, and that therefore Clark continued in possession of the car after having sold it, without acquiring any other title to remain in possession of it. There are, however, considerable difficulties in reconciling the two decisions, as appears from the judgment of du Parcq, J.

(d) Following observation of Channell, J., in *Oppenheimer v. Frazer & Wyatt*, [1907] 1 K.B. 519 ; [1907] 2 K.B. 50 ; 1 Digest 335, 495.

(e) Following *Mitchell v. Jones* (1905), 24 N.Z. L.R. 932 ; 39 Digest 535, a.

(f) [1937] 1 All E.R. 420 ; Digest Supp.

A mercantile agent who obtains possession of goods from the owner by larceny by a trick is not in possession of them with the "consent" of the owner and can give no title under section 2 (1) of the Factors Act, 1889 (g), unless the owner in fact consents to the mercantile agent having possession of them, with a view to passing the property to some other person (h). These decisions are extremely difficult to reconcile. A mercantile agent who obtains possession of goods by false pretences or who, being a bailee of goods, commits larceny as a bailee, can give a good title under section 2 (1) of the above Act (i).

If goods are consigned by owners to a mercantile agent for sale by him on their behalf for cash or on the hire system, and they are sent by the mercantile agent to an auctioneer for sale by auction, the transaction is not "a sale, pledge or other disposition made by a mercantile agent when acting in the ordinary course of business of a mercantile agent" within section 2 of the Factors Act, 1889 (j).

The kind of mercantile agent intended to be covered by the words in the Act is one who sells goods on commission (k). A person may be a mercantile agent although he only acts for one principal (l).

The "possession" by a mercantile agent of goods

(g) *Oppenheimer v. Frazer & Wyatt (supra)*; *Heap v. Motorists' Advisory Agency*, [1923] 1 K.B. 577; 39 Digest 531, 1441; *Cahn v. Pockett's, etc., Steam Packet Co.*, [1899] 1 Q.B. 643, 659; 39 Digest 519, 1352.

(h) *Folkes v. King*, [1923] 1 K.B. 282, C.A.; Digest Supp.; *Whitehorn Bros. v. Davison*, [1911] 1 K.B. 463; 39 Digest 535, 1458; see also *Baines v. Swainson* (1863), 4 B. & S. 270; 1 Digest 331, 469; *Cundy v. Lindsay* (1878), 3 App. Cas. 459; 39 Digest 534, 1454.

(i) *Heap v. Motorists' Advisory Agency (supra)*; *Folkes v. King (supra)*.

(j) *Waddington & Sons v. Neale* (1907), 96 L.T. 786; 1 Digest 337, 504.

(k) *Ibid.*

(l) *Lowther v. Harris*, [1927] 1 K.B. 393; Digest Supp.; and see *Hayman v. Flewker* (1863), 13 C.B. N.S. 519; 1 Digest 332, 472; *Weiner v. Harris*, [1910] 1 K.B. 285; 1 Digest 334, 487.

referred to in section 2 of the Factors Act, 1889, must be possession as a mercantile agent (*m*).

In *Kitto v. Bilbie* (*n*), Williams, J., doubted whether an assignment for the benefit of creditors would be within the provisions of sections 2 and 9 of the Act. In that case it will be noted that the agreement was in fact what is known as a "*Helby v. Matthews*" agreement (*o*), and therefore not an agreement to buy, but there appears to be no reason why a hirer under an agreement which is an agreement to buy, should not by appropriate words transfer a good title to a trustee for creditors under section 9 of the Act.

For decisions on the meaning of the words "mercantile agent" see *Weiner v. Harris* (*p*), *Inglis v. Robertson* (*q*).

It is within the ordinary course of business of a mercantile agent in the jewellery trade to pledge goods with a pawnbroker (*r*).

But it is not within the ordinary course of business of a mercantile agent to go to some friend and ask him to pledge goods but to go himself or send his clerk (*s*).

Collateral Security.—Neither the giving nor the discounting of bills of exchange or promissory notes given as collateral security for the instalments of hire-rent under a hire-purchase agreement convert the agreement into a sale on credit or into an agreement for sale (*t*).

Bargain and Sale.—The mere bargain and sale of goods which do not belong to the vendor, without a

(*m*) *Lowther v. Harris* (*supra*), and see *dicta* by Channell, J., in *Turner v. Sampson* (1911), 27 T.L.R. 200, at p. 202; 1 Digest 377, 829; *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (*supra*). See also cases under the former Factors Acts, e.g., *Lamb v. Attenborough* (1862), 1 B. & S. 831; 1 Digest 334, 484; *Hayman v. Flewker* (*supra*); *Cole v. N. W. Bank* (1875), L.R. 10 C.P. 354; 1 Digest 333, 477.

(*n*) (1895), 72 L.T. 266; 5 Digest 1091, 8920.

(*o*) [1895] A.C. 471; 3 Digest 93, 245.

(*p*) [1910] 1 K.B. 285; 1 Digest 334, 487.

(*q*) [1898] A.C. 616; 1 Digest 334, 489.

(*r*) *Janesich v. Attenborough* (1910), 26 T.L.R. 278; 1 Digest 337, 505.

(*s*) *De Gorter v. Attenborough* (1904), 21 T.L.R. 19; 1 Digest 336, 502.

(*t*) *Modern Light Cars, Ltd. v. Seals*, [1934] 1 K.B. 32; Digest Supp.; *In re Rankin v. Shiliday*, [1927] N.I. 162; Digest Supp.

delivery or transfer of possession, is not conversion (*u*). The act, unless in *market overt*, is merely void and without effect and does not change the property or the possession.

Estoppel.—It was held in *Marner v. Banks* (*v*) where the owner of a brougham allowed a hirer for a year to paint his arms upon the panel, that there was no estoppel such as would prevent the true owner from recovering the brougham from a *bona fide* purchaser for value (*w*).

No doubt many cases might arise in which the true owner would be estopped (*x*), and section 21, subsection (1) of the Sale of Goods Act, 1893 (*y*), provides, that where goods are sold by a person who is not the owner and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Pawnbrokers.—As is not unnatural and as was the case in the leading authority, there have been a number of cases in which pawnbrokers have been sued by the true owner of goods pledged by the hirer (*z*), on a refusal to deliver them up. Where the agreement under which the goods were hired does not amount to "an agreement to buy," the true owner is entitled to recover his goods or damages (*a*) and this, notwithstanding the statutory provision (*b*) that a pawnbroker shall not be bound to

(*u*) *Consolidated Co. v. Curtis*, [1892] 1 Q.B. 495 ; 3 Digest 47, 326 ; *Lancashire Waggon Co. v. Fitzhugh* (1861), 6 H. & N. 502 ; 43 Digest 482, 193 ; *Cochrane v. Moore* (1890), 25 Q.B.D. 57 ; 7 Digest 41, 210.

(*v*) (1867), 17 L.T. 147 ; 3 Digest 110, 347.

(*w*) See also *Heap v. Motorists' Advisory Agency*, [1923] 1 K.B. 577 ; 39 Digest 531, 1441.

(*x*) For a consideration of the principles under which estoppel by conduct arises see *Freeman v. Cooke* (1848), 2 Ex. 654 ; 21 Digest 287, 1019, and cases cited in *Phipson on Evidence*, 7th Ed., pp. 658-660.

(*y*) 17 Halsbury's Statutes 623, and *post*, p. 318, see *Heap v. Motorists' Advisory Agency* (*supra*).

(*z*) *Helby v. Matthews*, [1895] A.C. 471 ; 3 Digest 93, 245 ; *Burrows v. Barnes* (1900), 82 L.T. 721 ; 37 Digest 24, 190 ; *Clayton v. Le Roy*, [1911] 2 K.B. 1031 ; 37 Digest 11, 67.

(*a*) *Ibid.* ; *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37 ; 37 Digest 8, 37.

(*b*) *Pawnbrokers Act*, 1872, ss. 25, 26 ; 12 Halsbury's Statutes 695.

deliver back a pledge unless the pawn ticket for it is delivered to him.

Where, however, the agreement under which the pledgor has possession of the goods amounts to an agreement to buy, the pawnbroker is protected (c).

A pawnbroker, by merely accepting a pledge *bona fide* and without notice of the true owner's title, is not thereby guilty of conversion. The old action of trover presumed an innocent possession; it is only on his refusal to deliver up on demand that the cause of action arises (d).

Auctioneers.—It was decided in *Shenstone v. Hilton* (e), that the delivery by a hirer to an auctioneer for sale of goods held under a hire-purchase agreement which was found to amount to an agreement to buy (although it was similar in form to that in *Helby v. Matthews* (f), the decision in the House of Lords in the latter case had not yet been given), at a time when some of the instalments were unpaid, came within the meaning of the words "delivery or transfer" in section 9 of the Factors Act, 1889 (g), and the auctioneer was protected. Where, however, an agent had goods consigned to him for sale for cash or on the hire-purchase system, and he sent them to be sold by auction, getting an advance of £10 from the auctioneer on the purchase price, it was held that the auctioneer was liable to pay to the owner the full amount that the goods fetched at the auction, and that a payment into court of that sum less the £10, did not avail him, as the transaction was not in the ordinary course of business of a mercantile agent (h). If the agreement, is not an agreement to buy, and the person delivering does not

(c) *Thompson & Shackell, Limited v. Veale* (1896), 74 L.T. 130; 3 Digest 93, 243.

(d) *Consolidated Co. v. Curtis*, [1892] 1 Q.B. 495; 3 Digest 47, 326; *Clayton v. Le Roy* (*supra*); *Spackman v. Foster* (1883), 11 Q.B.D. 99; 32 Digest 344, 271.

(e) [1894] 2 Q.B. 452; 3 Digest 46, 321. And see *Nicholson v. Harper*, [1895] 2 Ch. 415; 37 Digest 19, 148.

(f) *supra*.

(g) 1 Halsbury's Statutes 40; Appendix C, *post*, p. 325.

(h) *Waddington & Sons v. Neale* (1907), 96 L.T. 786; 3 Digest 46, 322.

come within the terms of either section 2 or section 9 of the Factors Act, 1889 (*i*), or section 25 of the Sale of Goods Act, 1893 (*j*), the liability of the auctioneer depends upon whether he has so dealt with the goods as to exercise dominion over them, or to pass the property or possession of them, in which case he is liable to the true owner in trover, or whether he has simply settled the price and acted as intermediary, in which case he is not liable (*k*).

If he simply has possession of goods innocently, and does not deliver or deal with them, it is not conversion (*l*).

But if an auctioneer refuses to deliver up goods let on simple hire and sent to him to be sold by the hirer and received by him *bona fide*, unless his expenses be first paid, he is guilty of conversion (*m*).

(B) MARKET OVERT

As has been previously mentioned, the Common Law rule that no one could give a better title to goods than he had himself, had already been modified prior to the passing of the Factors Acts, by the gradual grafting on to the Common Law rule of an exception derived from the Law Merchant, whereby protection was given to a sale in *market overt* in favour of a person buying in good faith and without notice of any defect or want of title in the seller.

This exception was recognised in the codifying enactment of the Sale of Goods Act, 1893, which by section 22, subsection (1) provides :—

“Where goods are sold in market overt, according to the usages of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and

(*i*) 1 Halsbury's Statutes 38, 40 ; *post*, pp. 323, 325.

(*j*) 17 Halsbury's Statutes 626 ; *post*, p. 339.

(*k*) *Cochrane v. Rymill* (1879), 40 L.T. 744 ; 3 Digest 45, 320 ; *Hardacre v. Stewart* (1804), 5 Esp. 103 ; 3 Digest 47, 333 ; *Barker v. Furlong*, [1891] 2 Ch. 172 ; 3 Digest 45, 315.

(*l*) *Consolidated Co. v. Curtis*, [1892] 1 Q.B. 495 ; 3 Digest 47, 326.

(*m*) *Loeschman v. Machin* (1818), 2 Stark. 311 ; 3 Digest 45, 316.

without notice of any defect or want of title on the part of the seller."

The protection given by the Act applies to hired goods. The title acquired by the purchaser is good against all the world (*n*) ; but it does not apply to goods belonging to the Crown (*o*) ; nor to ships (*p*), and there are special regulations relating to the sale of horses (*q*), the failure to observe which will cause the purchaser to lose the protection of the rule (*r*).

Market overt has been defined as " an open, public and legally constituted market " (*s*).

The goods must be sold in the usual market place at the usual time (*t*), and openly (*u*), and must be of a kind usually sold in the market (*v*).

By the custom of the City of London (of which judicial notice is now taken) every shop in the City of London is a *market overt* for things usually sold in the shop (*w*), but not in respect of a sale by a customer to a shopkeeper (*x*).

For a general consideration of the custom of *market overt* in the City of London, see the interesting judgment of Scrutton, J., in *Clayton v. Le Roy* (*y*) (reversed in the Court of Appeal on another point) where most of the authorities are considered.

Although by a sale of goods in *market overt*, the purchaser acquires a good title, this does not in any way

(*n*) *North v. Jackson* (1859), 2 F. & F. 198, N.P. ; 33 Digest 563, 476.

(*o*) *Willion v. Berkley* (1561), 1 Plow. 223 ; 11 Digest 591, 928.

(*p*) *Hooper v. Gumm* (1867), 2 Ch. App. 282 ; 39 Digest 531, 1437.

(*q*) Sale of Stolen Horses Acts, 1555 and 1588-9 ; 11 Halsbury's Statutes 445, 447.

(*r*) See *Moran v. Pitt* (1873), 42 L.J. Q.B. 47 ; 33 Digest 539, 155.

(*s*) *Lee v. Bayes & Robinson* (1856), 18 C.B. 599 ; 3 Digest 115, 388.

(*t*) 2 Co. Inst. 713.

(*u*) *Ibid.* ; *Crane v. London Dock Co.* (1864), 5 B. & S. 313 ; 33 Digest 561, 444.

(*v*) *Ibid.*, and see generally the case of *Market-Overt* (1596), 5 Co. Rep. 83 (b) ; 33 Digest 561, 458.

(*w*) *Market-Overt Case* (*supra*).

(*x*) *Hargreave v. Spink*, [1892] 1 Q.B. 25 ; 33 Digest 562, 472.

(*y*) [1911] 2 K.B. 1031 ; 33 Digest 562, 461.

protect the seller who remains liable to the true owner for wrongfully dealing with his goods (z).

Upon the prosecution to conviction of an offender (e.g., a hirer who has stolen the hired goods) the property in the goods reverts in the true owner whether the sale was in *market overt* or otherwise (a).

But the owner of goods, even after prosecuting the thief to conviction, cannot recover the value of the goods in trover from a *bona fide* purchaser in *market overt*, who has, before the conviction of the thief, resold the goods, even though the owner gave notice of the robbery while they were in the *bona fide* purchaser's possession (b), and the original owner would be liable in trover if he retook the goods from a *bona fide* purchaser in *market overt*, before the prosecution of the thief (c).

(C) BILL OF SALE

Bill of Sale by Hirer.—Where the hirer, under an agreement in the form generally known as "*Helby v. Matthews*," during the hiring period, grants a bill of sale on the hired goods, by way of security for the payment of money, such bill of sale is void, except as against the grantor, in respect of the hired goods under section 5 of the Bills of Sale Act (1878) Amendment Act, 1882 (d), as the grantor is not the true owner of them, and in the case of an absolute bill of sale, he transfers no property to the grantee, as the hirer cannot transfer a right which he does not himself possess (e). But where the hirer has agreed

(z) *Peer v. Humphrey* (1835), 2 Ad. & E. 495; 33 Digest 563, 480; *Delaney v. Wallis & Sons* (1884), 14 L.R. Ir. 31, C.A.; 33 Digest 563, f.

(a) Sale of Goods Act, 1893, s. 24 (1); 17 Halsbury's Statutes 625; *post*, p. 339. For a discussion on restitution of stolen property generally, see *post*, p. 232.

(b) *Horwood v. Smith* (1788), 2 Term. Rep 750; 33 Digest 563, 479.

(c) *North v. Jackson* (1859), 2 F. & F. 198, N. P.; 33 Digest 563, 476.

(d) 2 Halsbury's Statutes 101.

(e) *Helby v. Matthews*, [1895] A.C. 471; 3 Digest 93, 245; cf. *Ex parte Barnett, Re Tamplin & Son* (1890), 62 L.T. 264; 7 Digest 126, 714.

to buy (f) the goods, and before the payment of the full amount, grants a bill of sale on the goods, the grantee is entitled to the goods, as section 9 of the Factors Act, 1889, applies (g); and if the owner removes the goods on account of default on the part of the hirer, the grantee of the bill of sale can successfully claim the goods from the owner (g).

SECTION 2—EXECUTION

One of the most fertile sources of confusion and trouble in connection with goods let on hire or hire-purchase arises when such goods are seized in execution by a sheriff or high bailiff. It is of importance that the officer of the Court should be immediately notified of the owner's claim, as otherwise, owing to the operation of recent legislation, considerable loss may accrue to the owner.

Fieri Facias.—Where a judgment or order in the High Court has been given or made against a person for the recovery of money or costs, it can be enforced against that person's goods and chattels by the writ of execution known as *fieri facias* (h). In the County Court the amount due under a judgment or order is recoverable under a warrant of execution in the nature of a writ of *fieri facias* addressed to the registrar of the court (in whose office the office of high bailiff is now merged), who by such warrant is empowered to levy or cause to be levied, by distress and sale of the goods and chattels of the person against whom such judgment or order has been made, such sum of money as may be ordered (i).

What may be Seized.—The general principle of the Common Law is that a sheriff or registrar may seize

(f) *Lee v. Butler*, [1893] 2 Q.B. 318; 3 Digest 92, 247.

(g) 1 Halsbury's Statutes 40; *Wylde v. Legge* (1901), 84 L.T. 121; 3 Digest 93, 244. See also pp. 154 *et seq.*, *ante*.

(h) R.S.C.O. 42, r. 17; O. 43, rr. 1-3.

(i) County Courts Act, 1934, s. 116; see also the County Court Rules, Order 25, Part II.

under a writ of *fi. facias* such property or interests of the judgment debtor as he can sell (*j*).

If goods are hired for a term, the bailee has a property in them for that term and the sheriff or registrar may seize those goods and sell the interest of the hirer in them (*k*), but not the whole property in the goods (*l*).

The very fact that the goods are taken in execution may, however, by the terms of the agreement between the owner and the hirer put an end to the interest of the hirer (*m*) and there is then no interest available for sale, and this is the case to-day, in practically every well-drafted hire-purchase agreement. A pawnbroker's interest in redeemable pledges may be seized and sold (*n*) ; so also may tenants' fixtures removable by a tenant (*o*), if the proceedings be against the tenant.

What may not be Seized.—A sheriff or registrar must at his peril seize only the goods of the person named in the warrant (*p*).

Fixtures affixed to the freehold cannot be taken in execution under a *fi. fa.* issued against the freeholder (*q*).

A lien being a personal right which cannot be sold, property in the possession of a judgment debtor by

(*j*) Com. Dig. Execution, c. 4 ; *Legg v. Evans* (1840), 6 M. & W. 36 ; 21 Digest 480, 598. This meant originally that only goods and chattels might be seized, but now by the Judgments Act, 1838, s. 12, 10 Halsbury's Statutes 19, money and various securities may also be seized.

(*k*) *Dean v. Whittaker* (1824), 1 C. & P. 347 ; 21 Digest 501, 760 ; *Pain v. Whittaker* (1824), Ry. & Moo. 99 ; 21 Digest 501, 758 ; *Legg v. Evans* (*supra*) ; *Jelks v. Hayward*, [1905] 2 K.B. 460, at p. 465 ; 21 Digest 502, 766.

(*l*) *Dean v. Whittaker* (*supra*).

(*m*) *Jelks v. Hayward* (*supra*) ; *Jones Bros. (Holloway), Limited v. Woodhouse*, [1923] 2 K.B. 117 ; 21 Digest 502, 765.

(*n*) *Re Rollason* (1887), 34 Ch. D. 495 ; 21 Digest 504, 787.
(*o*) *Place v. Fagg* (1829), 4 Man. & Ry. K.B. 277 ; 21 Digest 484, 636 ; *Crossley Bros., Limited v. Lee*, [1908] 1 K.B. 86 ; 21 Digest 485, 643 ; *Minshall v. Lloyd* (1837), 2 M. & W. 450 ; 21 Digest 485, 645.

(*p*) *Jarmain v. Hooper* (1843), 6 M. & G. 827 ; 21 Digest 549, 1235 ; *Catterall v. Kenyon* (1842), 3 Q.B. 310 ; 27 Digest 215, 1860.

(*q*) *Day v. Bisbit* (1595), Cro. Eliz. 374 ; 21 Digest 484, 634 ; *Winn v. Ingilby* (1822), 5 B. & Ald. 625 ; 21 Digest 484, 635 ; *Place v. Fagg* (*supra*).

reason of a lien for repairs, cannot be seized under a *fi. fa.* (r).

The wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, where the total value of the bedding, tools, and implements of trade does not exceed £5 (s), are protected from seizure under any execution or order of the court against goods and chattels (t). "Bedding" means whatever a person has for the purpose of sleeping accommodation, and includes a bedstead, or mattress, or both (u). If an implement of trade be the only thing which can be seized, then it is exempt from seizure, though the value of it be more than £5 (v).

By section 16 of the Electric Lighting Act, 1909 (w), extending section 25 of the Electric Lighting Act, 1882 (x), execution is forbidden upon electric lighting apparatus let on hire.

Position of Sheriffs, etc.—Under the Common Law, sheriffs and high bailiffs who sold goods which were not the property of the judgment debtor, were liable in conversion to the true owner, if the latter at the time of the sale was entitled to possession of the goods (y), even if no claim had been made to the goods, and the officer acted *bona fide* and had no means of knowing that the goods were not the property of the judgment debtor (z).

This state of things has been considerably altered by statute (a).

(r) *Legg v. Evans* (1840), 6 M. & W. 36; 21 Digest 480, 598.

(s) *Boyd Limited v. Bilham*, [1909] 1 K.B. 14, per Channell, J., at p. 15; 18 Digest 298, 339.

(t) See the Small Debts Act, 1845, and the County Courts Act, 1934, s. 121; 27 Halsbury's Statutes 147.

(u) *Davis v. Harris*, [1900] 1 Q.B. 729; 18 Digest 297, 325.

(v) *Lavell v. Richings*, [1906] 1 K.B. 480; 18 Digest 298, 338.

(w) 7 Halsbury's Statutes 750.

(x) 7 Halsbury's Statutes 696.

(y) *Jelks v. Hayward*, [1905] 2 K.B. 460; 21 Digest 502, 766.

(z) *Ibid.* *Crane & Sons v. Ormerod* [1903] 2 K.B. 37; 21 Digest 518, 936.

(a) An official receiver or trustee in bankruptcy is now also protected (unless he has been negligent) from personal liability for seizing or disposing of goods which were not the property of the debtor (Bankruptcy Act, 1914, s. 61; 1 Halsbury's Statutes 662).

By section 15 of the Bankruptcy Act, 1913 (b), it is provided as follows:—

15. Where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff or other officer charged with the enforcement of a writ, warrant or other process of execution, are sold by such sheriff, high bailiff or other officer, without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold, and no person shall be entitled to recover against the sheriff, high bailiff or other officer, or anyone lawfully acting under the authority of either of them, except as provided by the Bankruptcy Acts, 1883 and 1890, for any sale of such goods or for paying over the proceeds thereof, prior to the receipt of a claim to the said goods unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor: Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of the sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than such sheriffs, high bailiff, or other officer as aforesaid.

It will be realised on perusing this section, how important it is that prompt notice should be given to sheriffs and other officers of the owner's claim.

The proviso appears to be somewhat at variance with the earlier part of the section, and presumably it does not mean that the true owner can bring an action of detinue or trover against the purchaser from the officer, but he

(b) 1 Halsbury's Statutes 586. This section was not repealed by the Bankruptcy Act, 1914, but it is now repealed so far as relates to County Courts by Schedule V of the County Courts Act, 1934, and replaced by s. 130 of that Act (27 Halsbury's Statutes 149, and see text, *post.*) For the references to Bankruptcy Act, 1883 and 1890 in s. 15, see ss. 40 & 41 of the Bankruptcy Act, 1914; 1 Halsbury's Statutes 646. S. 40 restricts the rights of a creditor to retain the benefit of an execution as against a trustee in bankruptcy, and s. 41 deals with the duties of a sheriff under an execution, when he receives notice of a receiving order to deliver the goods or money in his hands to the official receiver. Reference must also be made now to ss. 268 & 269 of the Companies Act, 1929; 2 Halsbury's Statutes 952, 953, which contain similar provisions in relation to executions against the property of companies.

can, *e.g.*, obtain, in an action for money had and received, the proceeds of the sale paid to the execution creditor (c), or obtain damages from a hirer for breach of a clause in the agreement to the effect that he would not suffer or permit an execution to be levied in the goods.

This section is now repealed so far as relates to County Courts by Schedule V of the County Courts Act, 1934 (d), and replaced by section 130 (e), which is in substantially similar terms.

These two sections only apply where no claim has been made to the goods. Where a claim is made to goods taken in execution the procedure is regulated in the High Court by R.S.C.O. LVII and in the County Court by sections 132 and 133 of the County Courts Act, 1934 (f), and by O. XXVIII of the County Court Rules.

Section 132 of the County Courts Act, 1934, provides as follows :—

- “(1) Where a claim is made to or in respect of any goods seized in execution under process of a County Court, the claimant may—(a) deposit with the bailiff either :—
- (i) the amount of the value of the goods claimed ; or
 - (ii) the sum which the bailiff is allowed to charge as costs for keeping possession of the goods until the decision of the judge can be obtained on the claim ; or
 - (b) give the bailiff in the prescribed manner security for the value of the goods claimed.
- (2) For the purpose of this section, the amount of the value of the goods claimed shall, in case of dispute, be fixed by appraisement, and where that amount is deposited as aforesaid it shall be paid by the bailiff into Court to abide the decision of the judge upon the claim.
- (3) In default of the claimant complying with the

(c) *Jones Bros. (Holloway), Limited v. Woodhouse*, [1923] 2 K.B. 117 ; 21 Digest 502, 765.

(d) 27 Halsbury's Statutes 193.

(e) 27 Halsbury's Statutes 149.

(f) 27 Halsbury's Statutes 150.

foregoing provision of this section, the bailiff shall sell the goods as if no such claim had been made, and shall pay into Court the proceeds of the sale to abide the decision of the judge."

It was decided in the case of *Goodlock v. Cousins* (g) that a sale under the equivalent section, viz., 156 of the County Courts Act, 1888 (h), gave a purchaser a good title to the goods, but it must be borne in mind that the decision was made before the passing of the Bankruptcy Act, 1913, and in view of section 15 of that Act (see above), and section 130 of the County Courts Act, 1934, it is questionable how far this case and also *Crane & Sons v. Ormerod* (i) and *Jelks v. Hayward* (j) are now good law.

By O. XXVIII, rr. 2, 10, of the County Courts Rules, the registrar may in his discretion delay the sale until the judge has adjudicated on the claim.

By section 1 of the Landlord & Tenant Act, 1709 (k) section 67 of the Execution Act, 1844 (l), and section 134 of the County Courts Act, 1934 (m), sheriffs and bailiffs when levying execution upon any tenement are obliged also to levy and pay to the landlord of the premises whose rent is in arrear, such sums of money (within the limits laid down in the Acts), as are due for rent (n).

The bailiff is only entitled to sell under these provisions such goods as he can sell under the execution (o).

(g) [1897] 1 Q.B. 558; 21 Digest 518, 935.

(h) 27 Halsbury's Statutes 160.

(i) *supra*.

(j) *supra*.

(k) 10 Halsbury's Statutes 318. This does not now apply in the case of County Court executions.

(l) 10 Halsbury's Statutes 27.

(m) 27 Halsbury's Statutes 151. The provisions under this Act, which applies only to the County Court, differ in detail from those under the Landlord and Tenant Act, 1709.

(n) See s. 18 of the Bankruptcy Act, 1913; 1 Halsbury's Statutes 587, for variations of these provisions in relation to bankruptcy. See also Admiralty Court Act, 1861, s. 16; 1 Halsbury's Statutes 12.

(o) *Beard v. Knight* (1858), 8 E. & B. 865; 18 Digest 346, 816; *Foulger v. Taylor* (1860), 5 H. & N. 202; 18 Digest 346, 817; *Hughes v. Smallwood* (1890), 25 Q.B.D. 306; 18 Digest 346, 818.

Writ binds the Property.—A writ of *feri facias* or other writ of execution against goods, binds the property (*p*) in the hands of the execution debtor from the time the writ is delivered to the sheriff or officer charged with its enforcement (*q*). The effect of “binding property” is that into whosoever hands the property comes afterwards, it is liable to be seized under the writ, and though the debtor conveys the property away, the right of the execution creditor is not defeated unless the sale has been in *market overt* (*r*), or to a *bona fide* purchaser for value and without notice that the writ or any other writ of execution has been delivered to and remains unexecuted in the hands of the officer charged with its execution (*s*).

SECTION 3—DISTRESS FOR RENT

The subject of distress is of such importance in connection with hire and hire-purchase that it will be necessary to deal with it in some detail.

Distress is a remedy (the origin of which goes back so far that it is shrouded in obscurity), whereby a person is enabled in certain cases to obtain a summary redress without the intervention of the Courts by seizing the chattels of another person and holding them as a pledge (*t*), to enforce the payment of money, the performance of a duty, or the recovery of damage for trespass by cattle.

Distress is a creature of the Common Law, but the right in special cases may be conferred by contract or by statute (*u*).

The right was originally given by the Common Law in respect of a great number of services most of which are now obsolete, but we are only concerned here with the case of distress by a landlord for the purpose of recovering

(*p*) *Woodland v. Fuller* (1840), 11 A. & E. 859 ; 21 Digest 441, 240.

(*q*) Sale of Goods Act, 1893, s. 26 ; 17 Halsbury's Statutes 627.

(*r*) *Woodland v. Fuller* (*supra*), per Patteson, J., at p. 867.

(*s*) Sale of Goods Act, 1893, s. 26 ; 17 Halsbury's Statutes 627.

(*t*) *Gomersall v. Medgate* (1610), Yelv. 194 ; 18 Digest 260, 1.

(*u*) *e.g.* Distress for Rent Act, 1737.

rent due by a tenant. The landlord's Common Law right of distress as it existed originally, was a right to seize whatever movables were to be found on the premises out of which the rent issued and retain them until the rent was paid, but in the course of ages a multiplicity of exceptions has been grafted on to the original rule and in addition many important alterations have been imported by statute.

In 1689 a revolutionary change was brought about, by the enactment that in cases of distress for rent upon a demise, the landlord might sell the distress, *i.e.*, the goods distrained, unless they were replevied within five days (*v*).

Under the Common Law it was immaterial that the goods seized were not the goods of the tenant, and therefore goods lent or hired to the tenant or a lodger or any relative of either or the goods of a stranger which were upon the premises at the time of the distress, might be lost without redress, unless they came within the exceptions which will be referred to later (*w*).

(A) THE LAW OF DISTRESS AMENDMENT ACT

This position has been very considerably altered by the Law of Distress Amendment Act, 1908 (*x*), which by section 8 (*y*) repeals and supersedes the Lodgers' Goods Protection Act, 1871 (wherever and so far as applicable) and which is of the very greatest importance in all cases where goods on hire or hire-purchase are seized under a distress for rent.

The Act provides machinery whereby certain under-tenants, lodgers and other persons (*e.g.*, owners of goods let on hire or hire-purchase), not being tenants of any part of the premises and not having any beneficial interest

(*v*) Distress Act, 1689, s. 1 ; 5 Halsbury's Statutes 140.

(*w*) See *infra*, pp. 200 *et seq.*

(*x*) The operation of this Act is affected by the Hire-Purchase Act, 1938, s. 16. See *post*, p. 200.

(*y*) 5 Halsbury's Statutes 163 ; Appendix E, p. 357.

therein may protect their goods under certain circumstances from distress levied by the superior landlord in respect of rent due to the superior landlord by his immediate tenant (z).

A superior landlord shall (by section 9) (a) be deemed to include a landlord in cases where goods seized are not those of an undertenant or lodger, and the words tenant and undertenant do not include a lodger.

Undertenants.—The undertenant entitled to the protection of the Act is :—

“ any undertenant liable to pay by equal instalments not less often than every actual or customary quarter of a year, a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the tenancy (c). ”

The Act does not apply to an undertenant where the undertenancy has been created in breach of any covenant of agreement in writing between the landlord and his immediate tenant (d).

Lodgers.—The Act does not define the term “ lodgers,” save to enact that it is not included in the words tenant and undertenant (e).

Whether or not a person is a lodger is a question of fact (f), but the person in order to be a “ lodger ” must habitually sleep on the premises (g). The onus of proof lies on the person claiming to be a “ lodger ” (h).

(z) Law of Distress Amendment Act, 1908 ; Appendix E, *post*.

(a) *Ibid.* ; 5 Halsbury's Statutes 163 ; *post*, p. 358.

(c) *Ibid.*, s. 1 (a) ; 5 Halsbury's Statutes 160 ; *post*, p. 354.

(d) *Ibid.*, s. 5 ; 5 Halsbury's Statutes 163 ; *post*, p. 357.

(e) *Ibid.*, s. 9 ; *post*, p. 358.

(f) *Ness v. Stephenson* (1882), 9 Q.B.D. 245 ; 18 Digest 304, 413 ; *Morton v. Palmer* (1881), 51 L.J. Q.B. 7 ; 18 Digest 305, 414.

(g) *Heawood v. Bone* (1884), 13 Q.B.D. 179 ; 18 Digest 305, 416. And see *Bensing v. Ramsay* (1896), 62 J.P. 613 ; 18 Digest 305, 418 ; *Phillips v. Henson* (1877), 3 C.P.D. 26 ; 18 Digest 305, 419.

(h) *Morton v. Palmer*, *supra* ; *Thwaites v. Wilding* (1883), 12 Q.B.D. 4, C.A. ; 18 Digest 307, 428 ; *Bensing v. Ramsay* (1898), 14 T.L.R. 345 ; 30 Digest 517, 1719. All the cases referred to in notes (w) and (x) were under the Lodgers' Goods Protection Act, 1871.

The steps to be taken by the persons referred to in order to obtain the protection of the Act are as follows :

The Declaration.—If a superior landlord levies a distress on any furniture, goods or chattels of any person protected by the Act, for arrears of rent due from his immediate tenant, then such person may serve upon the superior landlord a declaration in writing, setting forth that the immediate tenant has no property or beneficial interest in the goods distrained, and that they are the property or in the lawful possession of such person and are not goods or live stock to which the Act is expressed not to apply. An omission to state that the goods are not goods to which the Act is expressed not to apply is a fatal defect in the Declaration (*i*). But the accidental omission of the word “not” in the phrase “expressed not to apply” does not invalidate the notice, if in fact the landlords were not thereby deceived and in fact knew about the circumstances (*j*). In the case of an undertenant or lodger, the declaration must state the amount of rent then due to the immediate landlord, the times at which future rent will be due, and must contain an undertaking to pay such rent to the immediate landlord until the arrears are paid off. To the declaration must be annexed a correct inventory subscribed by the undertenant, lodger or other person, of the goods referred to in the declaration (*k*). It is an illegal distress for a landlord to distrain or proceed with a distress after he

(*i*) *Druce & Co., Ltd. v. Beaumont Property Trust, Ltd.*, [1935] 2 K.B. 257 ; Digest Supp. The goods in question had been let under hire-purchase agreements, but the agreements had been determined so that the goods were no longer comprised in them and thus were within the protection of the Act, provided the owners served a proper Declaration.

(*j*) *Electro Rentals, Ltd. v. Toba*, unreported. This case was decided by Mackinnon, J., on 22nd July, 1935.

(*k*) The inventory itself need not be signed if it is annexed to a properly signed Declaration. (*Godlonton v. Fulham & Hampstead Property Co.*, [1905] 1 K.B. 431 ; 18 Digest 307, 432.) This was a decision under the Lodgers' Goods Protection Act, 1871, which, however, contains a similar phrase.

has been served with such a declaration (*l*) ; if a landlord does distrain after the service of such a declaration, the undertenant, lodger, or other person, may make an application before a stipendiary magistrate or two justices of the peace for an order for the restoration to him of the goods, and the magistrate or justices will inquire into the truth of the declaration and make such order as may seem just (*m*), and the aggrieved party has also his remedy in an action at law against the landlord (*n*).

The declaration need not be a statutory declaration (*o*) nor need it be signed by all the partners in a firm (*p*). A declaration made in consequence of one distress or threat of distress is not available for a second distress (*q*).

The provision in the concluding words of section 1 of the Act as to the penalty for a false declaration is now repealed (*r*), and superseded by section 5 of the Perjury Act, 1911 (*s*).

No method of service of the declaration is laid down in the Act, but it must be served on the landlord or upon the bailiff or other agent employed to levy the distress (*t*).

The protection given by the Act to the goods of persons coming within the description set out in section 1 (*c*) of the Act, *viz.* : " Any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the

(*l*) Presumably, once the sale is completed it is too late to serve a Declaration, since on the sale the proceeds are an instantaneous satisfaction of the rent *pro tanto* (*Moore v. Pyrke* (1809), 11 East, 52 ; 18 Digest 303, 406 ; and see *Jacob v. King* (1814), 5 Taunt. 451 ; 18 Digest 372, 1135).

(*m*) Law of Distress Amendment Act, 1908, s. 2 ; 5 Halsbury's Statutes 161 ; Appendix E, *post*, p. 355.

(*n*) *Ibid.*

(*o*) *Rogers, Eungblut & Co. v. Martin*, [1911] 1 K.B. 19 ; 18 Digest 305, 421.

(*p*) *Ibid.*

(*q*) *Thwaites v. Wilding* (1883), 12 Q.B.D. 4, C.A. ; 18 Digest 307, 428. For form of Declaration, see Appendix F, p. 376.

(*r*) Perjury Act, 1911, s. 17 & Sch.

(*s*) 4 Halsbury's Statutes 775.

(*t*) The Law of Distress Amendment Act, 1908, s. 1 ; 5 Halsbury's Statutes 160 ; *post*, p. 354.

premises or any part thereof," (*e.g.*, owners of goods on hire or hire-purchase) is very much curtailed by the terms of section 4 (*u*) and more particularly of subsection 1 thereof, which reads as follows :—

" This Act shall not apply to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, *hire-purchase agreement*, or settlement made by such tenant, nor to goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any livestock to which Section 29 of the Agricultural Holdings Act, 1908, applies."

It is advisable, therefore, to deal in some detail with the several classes of goods excepted from the protection of the Act.

(1) **Goods of husband or wife of tenant.**—" Goods belonging to the husband or wife of the tenant whose rent is in arrears."

The words " tenant whose rent is in arrear " includes either of two joint tenants (*v*). Goods let to the husband or wife of a tenant under a hire-purchase agreement in the usual modern form, whereby the property in the goods does not pass to the hirer until the option to buy is exercised, are not goods belonging to the husband or wife (*w*).

(2) **Goods comprised in Hire-Purchase Agreement.**—" Goods comprised in any bill of sale, hire-purchase agreement or settlement made by such tenant."

On the true construction of this section, the word " made " refers back to bill of sale and hire-purchase agreement as well as to settlement (*x*), and means a hire-purchase agreement to which the tenant is a party (*y*).

The words " comprised in any . . . hire-purchase

(*u*) 5 Halsbury's Statutes 162 ; *post*, p. 356.

(*v*) *Gamage (A. W.), Ltd. v. Payne* (1925), 134 L.T. 222 ; Digest Supp.

(*w*) *Shenstone & Co. v. Freeman*, [1910] 2 K.B. 84 ; 18 Digest 305, 420.

(*x*) *Rogers, Eungblut & Co. v. Martin*, *supra*.

(*y*) per Darling, J., in *Shenstone & Co. v. Freeman*, *supra*, at p. 90.

agreement" have been the subject of a series of cases in which success has alternated between the landlord and the owners of goods on hire-purchase in a marked manner. It was finally decided that goods continued to be comprised in the hire-purchase agreement so long as there remained contractual obligations relating to them which were derived from the agreement (z).

In *London Furnishing Company, Limited v. Solomon* (a) goods were let by the plaintiffs to the tenant of premises of which the defendant was the landlord, under a hire-purchase agreement which gave the owners no power to determine the agreement as a whole on breach thereof, but merely to retake possession of the goods, should the hirer (*inter alia*) fail to pay the instalments or get into arrear with her rent of the premises. The hirer got into arrears with her instalments and also with her rent of the premises and the owners purported to terminate the agreement and endeavoured unsuccessfully to retake possession of the goods. The landlord distrained and in spite of the service on him of a Declaration under the Law of Distress Amendment Act, 1908, sold the goods. In an action by the owners against the landlord, it was held reversing the decision of the County Court judge that the owners were entitled to succeed, on the ground that after the notice purporting to terminate the agreement, the hirer had no interest in the goods at all.

This case, which was not argued on behalf of the landlord, was not followed in *Hackney Furnishing Co. v. Watts* (b), where the facts were identical, and it was held that the demand for possession of the goods was not sufficient to determine the hire-purchase agreement so as to cause the goods to be no longer comprised in the hire-purchase agreement. Under the circumstances, the former case is generally regarded as having little weight as an authority.

(z) *Jay's Furnishing Co. v. Brand & Co.*, [1915] 1 K.B. 458; 18 Digest 306, 424. See *post*, p. 185.

(a) (1912), 106, L.T. 371; 18 Digest 306, 422.

(b) [1912] 3 K.B. 225; 18 Digest 306, 423.

In *Jay's Furnishing Company v. Brand & Co.* (c), the plaintiffs let goods to a tenant under a hire-purchase agreement which provided (*inter alia*) that "If a hirer does not duly perform and observe this agreement, same shall *ipso facto* be determined and the hirer shall forthwith return the goods to the owner and the owners shall be entitled to retake possession of same as being goods wrongfully detained by the hirer and for that purpose to enter upon any premises where the goods may be." The hirer fell into arrears with his instalments and the owners wrote him a letter (which he in fact never received) to the effect that the agreement was terminated and demanded the return of the goods, which they unsuccessfully endeavoured to retake later. The landlord then distrained, and the plaintiffs duly served a declaration upon him. The landlord refused, however, to hand over the goods except on payment of £9 14s. 6d. rent and costs, and in an action by the owners to recover these sums paid under protest, it was held that the goods were comprised in a hire-purchase agreement and, therefore, liable to distress.

It was held by Buckley, L.J. (d), that on the true construction of the agreement it was not *ipso facto* determined on any breach by the hirer but merely determinable at the option of the owners, and that as there remained after the distress contractual obligations relating to the chattels derived from the agreement, the goods were still comprised in the agreement and liable to distress. Phillimore, L.J., also based his judgment on the licence to enter upon premises to retake goods, after the purported termination of the agreement.

Smart v. Holt.—These last two cases were considered in the case of *Smart Bros., Limited v. Holt* (e).

There the plaintiffs let to a tenant goods under a hire-purchase agreement whereby the hirer agreed to pay punctually his instalments and the rent of the premises on which the goods were. The material parts of Clause 8 of the agreement were as follows: "In case of any breach

(c) [1915] 1 K.B. 458; 18 Digest 306, 424.

(d) *Ibid.*, at p. 465.

(e) [1929] 2 K.B. 303; Digest Supp.

of any term hereof, the owners may . . . (b) by written notice sent (by post or otherwise) to or left at the hirer's last known address forthwith and for all purposes absolutely determine and end this agreement, and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the goods with the owner's consent nor shall either party thereafter have any rights hereunder but such determination shall not discharge any pre-existing liability of the hirer to the owners."

The instalments and rent of the premises being in arrear the plaintiffs served a notice on the hirer terminating the agreement and subsequently the landlord distrained and sold the goods in spite of the service on him of a Declaration under the Act.

In an action by the plaintiffs against the landlord and his agents it was held, distinguishing *Hackney v. Watts* (f), and *Jay's v. Brand* (g) that the plaintiffs were entitled to succeed, inasmuch as they had terminated the agreement prior to the distress in such a way that the goods were no longer comprised in it. Wright, J., in the course of his judgment said :—

" I agree with my Lord that the notice put an end to the agreement, leaving the plaintiffs with no right to repossess themselves of the goods under any special power granted by the agreement, such as would be granted under clause 8 (a) if they had availed themselves of that clause. Clause 8 (b), on the contrary, though providing that rights of a personal character, such as claims for arrears of rent, should remain, had the effect of removing the goods from the ambit of the agreement ; the goods remained the property of the plaintiffs, but the licence to the defendants had been revoked by the notice given under the agreement ; the defendants had, after the notice, only such rights as flowed from that position at Common Law, that is, such rights as an owner of goods has against a person who no longer has a right to the possession of goods and who is holding without the owner's consent. The owner has, in such a case, no right of entry to retake possession ; he can merely ask for the delivery of the goods, and if refused delivery may fall

(f) *supra*.

(g) *supra*.

back upon the aid of the Court to give him possession in an action of detinue. I think that in such a case it cannot be said that the goods are comprised in the hire-purchase agreement at the material time, that is the levy of distress, when, as here, the owner of the goods has previously terminated the agreement by a notice duly given, as required by its terms. In an action of detinue following upon such a refusal by the hirer to re-deliver, the agreement of hiring under which the bailment was made would be irrelevant except as a matter of history or inducement; 'the detainer is the gist of the action,' as Lord Lyndhurst, C.B., said in *Gledstane v. Hewitt* (h)."

It is, therefore, apparent that it may become extremely important to ascertain the exact moment when goods let on hire-purchase cease to be comprised in the agreement. It was decided in *Drages, Ltd. v. Owen* (i) that a notice in the form in *Smart v. Holt* operates from the time of posting.

Times Furnishing Co., Ltd. v. Hutchings (j)—A further attempt has recently been made to obviate the danger of losing goods let under a hire-purchase agreement in such a way as to take the goods out of the agreement as soon as the landlord takes any steps towards distraining. In *Times Furnishing Co., Ltd. v. Hutchings*, goods were let under a hire-purchase agreement which provided *inter alia* that "this agreement and the [owner's] consent to the hirer's possession of the furniture comprised therein shall automatically determine and come to an end, if any landlord of the hirer threatens or takes any steps to levy a distress for rent upon the furniture." It was held that this meant that the agreement was voidable at the option of the owner on the landlord signing a warrant for distress and, if the owner so desired, void from the date of the warrant. The furniture thereupon would be protected from distress on one ground, *viz.*, because it had ceased to be comprised in a hire-purchase agreement made by

(h) (1831), 1 Cr. & J. 565; 43 Digest 510, 488.

(i) (1935), 52 T.L.R. 108; Digest Supp.

(j) [1938] 1 All E.R. 422.

the tenant. In the result, however, the plaintiff failed. as the furniture was held to come within the reputed ownership provisions of the Act, which will now be dealt with.

(3) **Goods in Reputed Ownership.**—"Goods in the possession, order or disposition of such tenant, by the consent and permission of the true owner, under such circumstances that such tenant is the reputed owner thereof."

These words are wider than those used in section 38 (c) of the Bankruptcy Act, 1914 (*k*), as in the latter Act, goods in the possession, order or disposition of the bankrupt, *in his trade or business*, alone are affected. They are even more comprehensive than those used in section 15, subsection 5, of the Bankruptcy Act, 1869 (now repealed), where the phrase "*being a trader*" appears in place of "*in his trade or business*."

Bankruptcy decisions will, however, be found of considerable assistance in construing this subsection.

A piano let under a hire-purchase agreement to the wife of a tenant, is not in the reputed ownership of the tenant so as to bring it within the subsection, even though the tenant and his wife are living together in the same house (*l*).

In order to bring goods within the words of section 15 (5) of the Bankruptcy Act, 1869, it has been held that they must be in the sole possession and the sole reputed ownership of the bankrupt (*m*).

The question as to whose possession the goods are in and in whose order and disposition are questions of fact (*n*).

(*k*) 1 Halsbury's Statutes 644.

(*l*) *Shenstone & Co. v. Freeman*, [1910] 2 K.B. 84 ; 18 Digest 305, 420 ; *Rogers, Eungblut & Co. v. Martin*, [1911] 1 K.B. 19 ; 18 Digest 305, 421. See also *Ramsay v. Margrett*, [1894] 2 Q.B. 18 ; 21 Digest 499, 740.

(*m*) *Ex parte Dorman, Re Lake*, (1872) 8 Ch. App. 51 ; 5 Digest 763, 6561 ; *Ex parte Fletcher, Re Bainbridge* (1878), 8 Ch. D. 218 ; 5 Digest 763, 6562.

(*n*) *Edmonds v. Best* (1862), 1 New Rep. 30 ; 5 Digest 750, 6475 ; *Ex parte Emerson, Re Hawkins* (1871), 41 L.J. Bcy. 20 ; 5 Digest 751, 6477 ; *Storer v. Hunter* (1824), 3 B. & C. 368 ; 5 Digest 755, 6508.

To give consent as a true owner, the owner must be *sui juris* (o). In determining the question of the consent of the true owner, the real relation of the parties must be taken into consideration (p).

The consent must be given *intra vires* (q) and cannot be given in ignorance of essential facts (r).

By the true owner is meant the person who has the legal right to possession and the power of dealing with the goods (s).

In bankruptcy cases, the consent of the true owner may be determined, so as to defeat the claims of the trustee in bankruptcy, by doing some act such as sending a notice determining the consent, demanding possession or endeavouring to seize the goods, even after the act of bankruptcy has been committed, if the true owner had no notice of it (t), and it would seem that the same principles apply to cases under the Law of Distress Amendment Act. Bray, J., in reading the judgment of the court in *Hackney Furnishing Co. v. Watts* (u), said :—

“ Until demand of possession goods comprised in a hire-purchase agreement are in the order and disposition of the tenant. . . . ”

(o) *Re Mills' Trusts*, [1895] 2 Ch. 564 ; 5 Digest 789, 6763.

(p) *Ex parte Atkin Bros., Re Watson & Co.*, [1904] 2 K.B. 753 ; 5 Digest 787, 6746.

(q) *Ex parte Butcher, Re Mellor* (1880), 13 Ch. D. 465 ; 5 Digest 788, 6751.

(r) *Miller v. Demetz* (1835), 1 Mood. & R. 479, N.P. ; 5 Digest 787, 6747 ; *Re Rawbone's Trust* (1857), 3 K. & J. 476 ; 5 Digest 787, 6749.

(s) *Ex parte Dale, Re Barker* (1819), Buck. 365 ; 5 Digest 789, 6759. And see *Re Mills' Trusts*, *supra* ; *Fraser v. Swansea Canal Navigation* (1834), 1 Ad. & El. 354 ; 5 Digest 789, 6761.

(t) See *Ex parte Bignold, Re Newton* (1836), 2 Deac. 66 ; 5 Digest 790, 6767 ; *Ex parte Moldaut, Re Hunter* (1833), 3 Deac. & Ch. 351, Ct. of R. ; 5 Digest 791, 6769 ; *Smith v. Topping* (1833), 5 B. & Ad. 674 ; 5 Digest 791, 6772 ; *Ex parte Knowlys, Re Pritchard* (1852), Fonbl. 238 ; 5 Digest 791, 6776 ; *Ex parte Cohen, Re Sparke* (1870), 40 L.J. Bcy. 14 ; 5 Digest 792, 6783 ; *Ex parte Phillips, Re Eslick* (1876), 4 Ch. D. 496 ; 5 Digest 793, 6784.

(u) [1912] 3 K.B. 225, at p. 232 ; 18 Digest 306, 423.

but this was merely obiter and unnecessary for the decision of the case.

Now, by the recent decision already referred to, *viz.* : *Times Furnishing Co., Ltd. v. Hutchings (v)*, it has been decided that, in order to determine the owner's consent to the tenant's possession of goods let to him on hire-purchase, it is not sufficient to provide in the hire-purchase agreement that "the [owner's] consent to the hirer's possession of the furniture comprised therein shall automatically determine and come to an end if any landlord of the hirer threatens or takes any step to levy a distress for rent upon the furniture." The owner must take some overt step to determine his consent, and in default of so doing the goods remain in the reputed ownership of the tenant (hirer) and are distrainable.

Reputed ownership is a question of fact (*w*) and therefore evidence can be called of acts, facts and admissions for and against the reputation of ownership (*x*), and even apparently of the general notoriety of the facts in the neighbourhood (*y*).

The Court must be satisfied that the inference of ownership is one which "must" arise (*z*).

Hire-Purchase Act, 1938.—This Act, which comes into force on 1st January, 1939, contains some important provisions which extend the protection against distress given by the Law of Distress Amendment Act, 1908, or, to put it more exactly, limits the exclusion from such

(v) [1938] 1 All E.R. 422.

(w) *Hickenbotham v. Groves* (1826), 2 C. & P. 492, N.P. ; 5 Digest 793, 6785 ; *Prismall v. Lovegrove* (1862), 6 L.T. 329 ; 5 Digest 793, 6787 ; *Chappell & Co., Ltd. v. Harrison* (1910), 103 L.T. 594 ; 5 Digest 807, 6895.

(x) *Hall v. Day* (1861), 2 F. & F. 568, N.P. ; 5 Digest 800, 6834 ; *Lingard v. Messiter* (1823), 1 B. & C. 308 ; 5 Digest 800, 6839 ; *Gurr v. Rutton* (1816), Holt, N.P. 327, N.P. ; 5 Digest 801, 6840.

(y) *Muller v. Moss* (1813), 1 M. & S. 335 ; 5 Digest 801, 6841 ; *Shrubsole v. Sussams* (1864), 16 C.B.N.S. 452 ; 5 Digest 801, 6842.

(z) *Re Kaufman, Segal & Domb, Ex parte Trustee*, [1923] 2 Ch. 89 ; Digest Supp.

protection imposed by section 4 of the latter Act (a) in the case of goods let under hire-purchase agreements coming within the scope of the Act (b). It provides by section 16 (1) that "where under the powers conferred by this Act, the Court has postponed the operation of an order for the specific delivery of goods to any person, the goods shall not during the postponement be treated as goods which are by the consent or permission of that person in the possession, order or disposition of the hirer for the purposes of section four of the Law of Distress Amendment Act, 1908. . . ." Subsection (2) of the same section provides that "After the determination of a hire-purchase agreement, or after an owner, having a right to recover from a hirer goods which have been let under a hire-purchase agreement, has commenced an action to enforce that right, the goods which have been let under the agreement, or the goods claimed in the action, as the case may be, shall not (notwithstanding that the Court in any such action postpones the operation of an order for specific delivery of the goods to the owner) be treated as goods comprised in the hire-purchase agreement for the purposes of section four of the Law of Distress Amendment Act, 1908" (c).

Custom.—By a rule of bankruptcy, the reputation of ownership can be rebutted, where it can be proved to the satisfaction of the Court, that a particular class of goods is by custom or usage of trade, notoriously left in possession of persons who are not the owners (d).

Although this is a rule of bankruptcy, it will apply to protect goods let on hire or hire-purchase from a distress by the landlord, and take them out of the exception from

(a) 5 Halsbury's Statutes 162 ; Appendix E, *post*, p. 356.

(b) The categories to which the Act applies are set out in s. 1.

(c) To ascertain to what extent s. 16 applies to hire-purchase agreements made before the commencement of the Act, see s. 20 (1) (d).

(d) *Ex parte Emerson, Re Hawkins* (1871), 41 L.J. Bcy. 20 ; 5 Digest 803, 6859 ; *Ex parte Brooks, Re Fowler* (1883), 23 Ch. D. 261 ; 5 Digest 805, 6887. And see numerous cases cited below.

protection established by section 4 of the Law of Distress Amendment Act, 1908 (*e*), provided the goods are not otherwise excepted from protection, *e.g.*, by being goods comprised in a hire-purchase agreement made by a tenant ; and once a custom has been proved so as to defeat the reputation of ownership, as to a certain class of goods left in a certain class of persons' possession, all goods coming within that class and in the possession of a person of that class, are protected, whether they were in fact left in the possession under circumstances that are within the scope of the custom or not (*f*). *E.g.*, if a custom were proved of hiring pianos under hire-purchase to music-halls, then a piano simply lent to a music-hall would be protected as the reputation of ownership would have been rebutted by proof of the custom (*g*).

The custom may be proved either by reported cases or by direct evidence of the custom (*h*), and a custom may become so notorious that the Courts will take judicial notice of it without proof (*i*).

The onus is on the person setting up the custom to prove it (*j*), and in order to prove it, it is sufficient to prove that it is known to the whole trade and to the ordinary likely creditors of a person in that trade (*k*), and it need not be proved that the custom is notorious to the public generally (*l*).

Custom as to Household Furniture.—In view of

(*e*) 5 Halsbury's Statutes 162 ; *Chappell v. Harrison*, *supra*.

(*f*) *Ex parte Turquand, Re Parker* (1885), 14 Q.B.D. 636 ; 5 Digest 807, 6889 ; *Re Tabor, Ex parte Cork*, [1920] 1 K.B. 808 ; Digest Supp.

(*g*) See *Chappell v. Harrison*, *supra*, where, however, it was held that the custom had not been established.

(*h*) *Ex parte Powell, Re Matthews* (1875), 1 Ch. D. 501 ; 5 Digest 804, 6869.

(*i*) *Ibid*.

(*j*) *Ex parte Scarth, Re Ashton* (1840), 1 Mont. D. & De G. 240 ; 5 Digest 803, 6862.

(*k*) *Ex parte Watkins, Re Couston* (1873), 5 Ch. App. 520 ; 5 Digest 803, 6863 ; *Re Hill* (1875), 1 Ch. D. 503 (*n*) ; 5 Digest 803, 6864 ; *Ex parte Linnell, Re Rose* (1888), 4 T.L.R. 255, C.A. ; 5 Digest 803, 6865.

(*l*) *Ex parte Watkins, Re Couston*, *supra* ; *Watson v. Peache* (1834), 1 Bing. N.C. 327 ; 5 Digest 804, 6870.

the prevalence of the habit of letting furniture on hire-purchase, one would have thought that a custom of letting household furniture to persons generally on hire-purchase would by now have been established, but it appears that this is not the case (*m*), although in *Ex parte Emerson, Re Hawkins* (*n*) the Court seems to have gone so far as to say that it would take judicial notice of such custom without any evidence being produced to support it.

This view, however, has not been followed in subsequent cases (*o*).

Custom as to Hotels and Boarding Houses.—The position is, however, different in the case of furniture let on hire to a hotel keeper (*p*), and it appears that the Courts will take judicial notice of such a custom (*q*). A boarding-house keeper, who has no licence for the sale of intoxicating liquor, is an hotel keeper within this custom (*r*).

Pianos.—The position as regards pianos is a little curious. In *Ex parte Hattersley, Re Blanshard* (*s*), it was held by Chief Judge Bacon to be conclusively proved that there was a custom of letting pianos on hire-purchase terms for three years, but in *Chappell v. Harrison* (*t*) it was held that the Court would not take judicial notice of the custom so as to exclude the application of the doctrine of reputed ownership to pianos generally, without hearing evidence on the matter.

(*m*) *Ex parte Brooks, Re Fowler* (1883), 23 Ch. D. 261 ; 5 Digest 805, 6881. And see *Chappell v. Harrison, supra*.

(*n*) (1871), 41 L.J. Bcy. 20 ; 5 Digest 803, 6859.

(*o*) *Ex parte Powell, Re Mattheews, supra* ; *Re Tabor, ex parte Cork, supra*.

(*p*) *Ex parte Turquand, Re Parker, supra*.

(*q*) *Crawcour v. Salter* (1881), 18 Ch. D. 30 ; 5 Digest 806, 6888 ; *Ex parte Turquand, Re Parker, supra*.

(*r*) *Ex parte Whiteley, Re Chapman* (1894), 11 T.L.R. 92 ; 5 Digest 807, 6891.

(*s*) (1878), 8 Ch. D. 601 ; 5 Digest 807, 6894.

(*t*) (1910), 103 L.T. 594 ; 5 Digest 807, 6895, a case under the Law of Distress Amendment Act, 1908. *cf. Ex parte Murphy, Re M'Parland* (1893), 31 L.R. Ir. 465 ; 5 Digest 757, *f*.

In the following cases a custom has been proved of letting on hire or hire-purchase certain classes of goods to certain classes of persons :—

Furniture, to hotel keepers. (*Crawcour v. Salter* (1881), 18 Ch. D. 30 ; 5 Digest 806, 6888), and see cases cited above.

Printing machinery (other than type), to printers. (*Ex parte Hughes, Re Thackrah* (1888), 4 T.L.R. 659 ; 5 Digest 807, 6896.)

Horses, to coal merchants, brewers, etc. (*Ex parte Wiggins, Re Nicholls* (1832), 2 Deac. & Ch. 269 ; 5 Digest 806, 6886.)

Barges, to coal merchants. (*Watson v. Peache* (1834), 1 Bing. N.C. 327 ; 5 Digest 804, 6870.)

Gas engines, to coopers. (*Ex parte Crossley, Re Peel*, [1894] 1 I.R. 240 ; 5 Digest 807, *h.*)

Sewing machines (in Ireland). (*Ex parte Singer, Re Blackwell* (1878), 12 I.L.T. 57 ; 5 Digest 808, *k.*)

Funeral Carriages (in Ireland). (*Re Torrens*, [1924] 2 I.R. 1, C.A. ; Digest Supp.)

Steam engines, to timber merchants. (*Ex parte Stooke, Re Bampffield* (1872), 20 W.R. 925 ; 5 Digest 799, 6829.)

Railway wagons (custom admitted). (*Leman v. Yorkshire, etc., Co.* (1881), 50 L.J. Ch. 293 ; 5 Digest 963, 7887.)

A custom has also been proved of persons other than the true owner having the goods of others in their possession, under other circumstances, in the following cases :—

Cattle—Agistment. (*Ex parte Swansea Mercantile Bank, Limited, Re James* (1907), T.L.R. 15, C.A. ; 5 Digest 805, 6877.)

Safes, with retail ironmongers, on sale or return. (*Ex parte Poppleton, Re Lock* (1891), 63 L.T. 839 ; 5 Digest 805, 6880.)

Clocks, with clock-makers, for repairs. (*Hamilton v. Bell* (1854), 10 Ex. 545 ; 5 Digest 805, 6879.)

Hops, after sale, with hop merchants. (*Ex parte Dyer, Re Taylor* (1885), 53 L.T. 768 ; 5 Digest 806, 6884.)

Horses, with horse dealer, on sale or return. (*Ex parte Wingfield, Re Florence* (1879), 10 Ch. D. 591 ; 5 Digest 806, 6885.)

Barley and malt, with malt agent. (*Harris v. Truman* (1882), 9 Q.B.D. 264 ; 5 Digest 807, 6893.)

Wines and spirits in bonded warehouse. (*Ex parte Watkins, Re Couston* (1873), 8 Ch. App. 520 ; 5 Digest 808, 6898.)

Books, with bookseller, for sale on commission. (*Whitfield v. Brand* (1847), 16 M. & W. 282 ; 5 Digest 797, 6815.)

Stock, with farmers, after purchase. (*Priestley v. Pratt* (1867), L.R. 2 Ex. 101 ; 5 Digest 805, 6875.)

Goods, with wharfinger. (*Simeons v. Durand*, [1928] 2 K.B. 66 ; Digest Supp.)

There has been failure to prove a custom in the following cases :—

Household furniture generally, on hire-purchase. (*Vide supra*.)

Cabs, on hire-purchase. (*Re Hill* (1875), 1 Ch. D. 503, n ; 5 Digest 805, 6878.)

Furniture, on sale or return. (*Ex parte Nassau, Re Horn* (1886), 2 T.L.R. 339 ; 5 Digest 806, 6882.)

Grocers' vans. (*Re Jensen, Ex parte Callow* (1886), 4 Morr. 1, D.C. ; 5 Digest 803, 6861.)

Tables, etc., to clothing manufacturers. (*Re Kaufman Segal & Domb, Ex parte Trustee*, [1923] 2 Ch. 89 ; Digest Supp.)

(4) **Other Goods.**—Consideration has so far been given only to the exclusion from the protection of the Act provided for by section 4, subsection 1, but the Act, by subsection 2 of section 4, also excludes from its privileges the goods of a partner of the immediate tenant, goods on premises where there is carried on a trade in which both the immediate tenant and the undertenant

have an interest, goods on premises used as offices, or a warehouse where the owner of goods neglects for one calendar month after notice to remove the goods and vacate the premises, and goods belonging to and in the offices of any company or corporation, on premises the immediate tenant of which is a director, an officer or servant of such company or corporation (*u*). The superior landlord, undertenant or other person may apply to a stipendiary magistrate (or two justices where there is no stipendiary) to determine whether any goods are, in fact, goods covered by subsection 2 of section 4.

Subsection 2 does not require any detailed examination in relation to the subject matter of this textbook.

(B) ESSENTIALS OF DISTRESS

Quite apart from the protection given by the Law of Distress Amendment Act, 1908, to hired goods and in certain cases to goods let on hire-purchase, owners of such goods may be able to recover their goods or the value of them when the landlord of the premises has distrained upon them, even in cases where the owners have failed to comply with the requirements of the Act, by reason of the fact that the distress was in itself illegal.

It will be necessary therefore to review shortly the essentials of distress and the more important statutory and Common Law exceptions to liability for distress, but reference should be made also to the textbooks on the subject, if great detail is required.

Essentials of Distress and its Levying.—Unless there is existing the relationship of landlord and tenant (both when the rent becomes due and when the distress is levied), and rent is in arrear, there exists no right of distress. If a person has only a limited right to use the premises and has not exclusive possession of them, he

(*u*) Law of Distress Amendment Act, 1908, s. 4 (2) ; 5 Halsbury's Statutes 162 ; Appendix E, *post*, p. 356.

is not a tenant and there is no right to distrain (*v*). *Apart* from the Landlord & Tenant Act, 1709, the right to distrain does not continue after the tenancy has determined (*w*). If the tenant takes possession under an agreement for a lease which can be specifically enforced, the right to distrain arises (*x*). The rent must be certain, even though it be fluctuating, otherwise the landlord has no right to distrain (*y*). The rent must be in arrear before there can be distress, and it is in arrear the day after it is payable (*z*). Rent payable in advance may be distrained for on the day following that fixed for payment (*a*). There can be no distress for arrears of more than six years old, unless there has been an acknowledgment in writing less than six years previously to the distress (*b*), but so long as the relationship of landlord and tenant exists there may be distress for six years' arrears of rent (*c*). A distress cannot be levied twice for the same rent, unless there were not sufficient goods on the premises on the first occasion (*d*), or the landlord reasonably mistook the value of the goods on the first occasion (*e*), or the tenant has done something to induce the landlord to refrain from realising what he might by the first

(*v*) *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344, C.A.; 18 Digest 296, 312; *Hancock v. Austin* (1863), 14 C.B. N.S. 634; 18 Digest 269, 75.

(*w*) *Williams v. Stiven* (1846), 9 Q.B. 14; 18 Digest 312, 471; *Gray v. Stait* (1883), 11 Q.B.D. 668; 18 Digest 363, 1004; *Murgatroyd v. Silkstone, etc., Co., Ltd.* (1896), 65 L.J. Ch. 111; 18 Digest 311, 470.

(*x*) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9; 18 Digest 267, 63.

(*y*) *Regnart v. Porter* (1831), 7 Bing. 451, *per* Alderson, J., at p. 454; 18 Digest 272, 100. *Re Knight, Ex parte Voisey* (1882), 21 Ch. D. 442, C.A.; 18 Digest 273, 107.

(*z*) *Dibble v. Bowater* (1853), 2 E. & B. 564; 18 Digest 310, 452; *Child v. Edwards*, [1909] 2 K.B. 753; 18 Digest 309, 442; this was a case in which the rent was due on a Sunday, and it was held that distress on the Monday following was legal.

(*a*) *Harrison v. Barry* (1819), 7 Price, 690; 18 Digest 309, 445.

(*b*) Real Property Limitation Act, 1833; 10 Halsbury's Statutes 455.

(*c*) *Archbold v. Scully* (1861), 9 H.L. Cas. 360; 18 Digest 317, 517.

(*d*) *Wallis v. Savill* (1701), 2 Lut. 1532; 18 Digest 359, 964.

(*e*) *Hutchins v. Chambers*, *infra*.

distress (f). If a landlord levies for too small a sum on the first distress, it is his own fault, and he cannot repair it by a second levy (g) but if the first distress was illegal and a mere trespass and void *ab initio*, then the landlord can levy again for the same rent (h).

It is provided by section 6 of the Increase of Rent, & Mortgage Interest (Restrictions) Act, 1920 (i), that no distress for the rent of any dwelling-house to which the Act applies (j) shall be levied except by leave of the County Court (k).

Who may Distrain.—A distress may be levied by any person in whom is vested the reversion incident to a term at the time the distress is made, *i.e.*, the landlord personally, or under section 7 of the Law of Distress Amendment Act, 1888, by a bailiff authorised to act by a certificate under the hand of a County Court Judge (l).

The managing director of a company, unless certificated under the above section, cannot levy a distress (m).

The Statute forbids an uncertificated person acting *as a bailiff* to distrain, but presumably, this does not affect the right of the person to whom the rent is due levying in his own person (n).

It is a trespass for an uncertificated person and the

(f) *Bagge v. Mawby, infra. Lee v. Cooke* (1858), 3 H. & N. 203, Ex. Ch.; 18 Digest 420, 1588.

(g) *Bagge v. Mawby* (1853), 8 Exch. 641; 18 Digest 358, 951; *Hutchins v. Chambers* (1758), 1 Burr. 579; 18 Digest 358, 956; *Grunnell v. Welch*, [1905] 2 K.B. 650; affirmed, [1906] 2 K.B. 555, C.A.; 18 Digest 334, 686.

(h) *Grunnell v. Welch, supra*.

(i) 10 Halsbury's Statutes 341. By s. 1 of the Increase of Rent, & Mortgage Interest Restriction Act, 1938, this Act as amended from time to time is to continue in force until 24th June, 1942.

(j) *Vide* s. 12 (2); 10 Halsbury's Statutes 345.

(k) *Vide Townsend v. Charlton*, [1922] 1 K.B. 700; 18 Digest 275, 129, for principles on which the court should act.

(l) 5 Halsbury's Statutes 158; *post*, p. 357. By s. 2 of The Law of Distress Amendment Act, 1895; 5 Halsbury's Statutes 159, any person levying without a certificate is liable to a fine not exceeding £10.

(m) *Hogarh v. Jennings*, [1892] 1 Q.B. 907; 18 Digest 277, 140.

(n) *Ibid.*

person authorising him, to levy in contravention of the above section, and the owner of the goods, *e.g.*, hired goods, can recover damages from both (*o*).

A certificate granted to a bailiff may at any time be cancelled by a County Court Judge (*p*).

What may not be Distrained.—As previously stated (*q*) under the Common Law, a landlord could distrain upon any goods and chattels—whether of the tenant or of a stranger—upon the land out of which the rent issued, but in the course of ages a great number of exceptions became engrafted on the Common Law rule. These exceptions arise partly in respect of the person in whose possession the goods are, partly in respect of the nature of the goods, and partly in respect of the place where they are. Privilege from distress may be absolute or qualified, and may in certain cases be claimed for goods on hire or hire-purchase. It should be noted that these exceptions are not affected by section 4 of the Law of Distress Amendment Act, 1908 (*r*), and that goods privileged from distress are not rendered liable thereto merely because they are comprised in a hire-purchase agreement, as that Act did not render liable to distress any classes of goods previously exempt but merely, in certain cases, withheld the additional protection given by the Act.

It is an illegal distress to distrain upon goods thus privileged.

It is not the province of this book to deal with the various exceptions. Reference should be made to the textbooks on Landlord and Tenant and on Distress for that purpose. The list given below is a concise summary of the more important exceptions likely to affect goods hired or let on hire-purchase terms.

(*o*) *Perring & Co. v. Emerson*, [1906] 1 K.B. 1; 18 Digest 331, 655.

(*p*) The Law of Distress Amendment Act, 1895 (*supra*), s. 1; 5 Halsbury's Statutes 159.

(*q*) See p. 179.

(*r*) 5 Halsbury's Statutes 162; *post*, p. 356.

A.—ABSOLUTE PRIVILEGE

I. BY COMMON LAW

- 1.—The property of the Crown (s).
- 2.—Trade privilege. Goods delivered to tenants in the way of trade, to be wrought, carried (t), etc. It must be a public trade (u).
- 3.—Fixtures. Things affixed to the freehold whether an irremovable fixture or severable by the tenant (v).

A temporary removal for some necessary purpose does not destroy the privilege (w).

A gas engine let out on hire under a hire-purchase agreement and affixed to the floor of the premises by bolts and screws, was held to be a fixture and not distrainable (x).

If a chattel is attached to the freehold, merely for its convenient use as a chattel, and the connection is so slight that the chattel can be removed without injury to the freehold, it is not exempt (y).

- 4.—Goods of a perishable nature.

(s) *Secretary of State for War v. Wynne*, [1905] 2 K.B. 845; 18 Digest 291, 262.

(t) *Simpson v. Hartopp* (1744), Willes, 512; 18 Digest 288, 247.

(u) *Challoner v. Robinson*, [1908] 1 Ch. 49, C.A.; 18 Digest 292, 273.

(v) *Crossley Brothers, Ltd. v. Lee*, [1908] 1 K.B. 86; 18 Digest 297, 320; *Turner v. Cameron* (1870), L.R. 5 Q.B. 306; 18 Digest 297, 321; *Provincial Bill Posting Co. v. Low Moor Iron Co.*, [1909] 2 K.B. 344; 18 Digest 296, 312.

(w) *Gorton v. Falkner* (1792), 4 Term Rep. 565; 18 Digest 289, 248.

(x) *Crossley v. Lee*, *supra*. In this case and others the decision in *Hellawell v. Eastwood*, *infra*, was not followed on the facts; *Vide Hobson v. Gorringe*, [1897] 1 Ch. 182; 35 Digest 309, 563; *Reynolds v. Ashby & Son*, [1904] A.C. 466; 35 Digest 309, 565.

(y) *Hellawell v. Eastwood* (1851), 6 Ex. 295; 18 Digest 296, 319. This case, though dissented from on the facts in several cases (*vide supra*), has been followed on the law in *Holland v. Hodgson* (1872) L.R. 7 C.P. 328; 35 Digest 304, 538.

- 5.—Goods in actual use, *e.g.*, a stocking frame on which a person is actually weaving (*z*).
- 6.—Goods in the custody of the law (*a*), *e.g.*, goods taken in execution (*b*), but not after the sheriff has relinquished (*c*).

2. BY STATUTE

In a sense, goods privileged from distress by Statute enjoy a qualified privilege, as the exemptions are subject to the terms of the Statutes, which should be referred to, but, of course, this is not the sense in which the word "qualified" is used in connection with Distress (*d*).

- i.—The wearing apparel and bedding of a tenant and his family, and the tools and implements of his trade, to the value of £5 (*e*).

There is no Common Law privilege for wearing apparel (*f*), but tools and implements of trade are exempt under the Common Law while in the actual use (*g*), and if there be no other distress available on the premises (*h*). Bedding includes everything used for the purposes of sleeping accommodation, *e.g.*, bedstead and mattress (*i*).

A sewing-machine hired by a man for the use

(*z*) *Simpson v. Hartopp*, *supra*.

(*a*) Co. Litt. Vol. 1, Part 1, 47 (*a*) & 47 (*b*); Gilbert, *Distress*, p. 40; *R. v. Cotton* (1751), Parker, 112; 18 Digest 343, 739; *Parrett Navigation Co. v. Stower* (1840), 8 Dowl. 405; 6 M. & W. 564; 18 Digest 366, 1052; *Cotsworth v. Betison* (1696), 1 Salk. 247; 1 Ld. Raym. 104; 18 Digest 366, 1044.

(*b*) *Eaton v. Southby* (1738), Willes, 131; 18 Digest 311, 466; *Wharton v. Naylor* (1848), 6 Dow. & L. 136; 18 Digest 343, 785; Gilb. Dist. 40.

(*c*) *Blades v. Arundale* (1813), 1 M. & S. 711; 18 Digest 348, 859.

(*d*) See *post*, p. 203.

(*e*) Law of Distress Amendment Act, 1888. And see Law of Distress Amendment Act, 1895, s. 4; 5 Halsbury's Statutes 159, and County Courts Act, 1934, s. 6; 27 Halsbury's Statutes 95.

(*f*) *Bisset v. Caldwell* (1791), Peake, 50, N.P.; 18 Digest 297, 322.

(*g*) *Vide supra*.

(*h*) *Post*, p. 203.

(*i*) *Davis v. Harris*, [1900] 1 Q.B. 729; 18 Digest 297, 325.

of his wife in support of himself and family, is an implement of his trade under the Act (*j*).

The same applies to a sewing-machine obtained under a hire-purchase agreement, payment being still due (*k*).

A cab used by a cab-driver (*l*), a piano used by a tenant's wife as a music teacher (*m*), are implements of trade, but not a typewriter used as a traveller's sample (*n*).

If the only implement available is worth more than £5, it is protected (*o*).

- 2.—Agricultural or other machinery, the property of a person other than the tenant, hired, etc., to the tenant, and live stock the property of a person other than the tenant, and on the premises solely for breeding purposes (*p*).
- 3.—Frames, looms, machinery, etc., used in textile manufactures, whether hired or not, unless the rent is owned by the owner (*q*).
- 4.—Railway Rolling Stock in a "work"; unless the actual property of the tenant. But the true owner must be indicated by mark (*r*).
- 5.—Crops and farming stock taken in execution and sold by the sheriff (*s*).
- 6.—Gas, electric light, water fittings and machinery (*t*).

(*j*) *Churchward v. Johnson* (1889), 54 J.P. 326; 18 Digest 298, 335.

(*k*) *Masters v. Fraser* (1901), 85 L.T. 611; 18 Digest 298, 336.

(*l*) *Lavell v. Richings*, [1906] 1 K.B. 480; 18 Digest 298, 338.

(*m*) *Boyd, Limited v. Bilham*, [1909] 1 K.B. 14; 18 Digest 298, 339.

(*n*) *Addison v. Shepherd*, [1908] 2 K.B. 118; 18 Digest 298, 347.

(*o*) *Lavell v. Richings*, *supra*.

(*p*) Agricultural Holdings Act, 1923, s. 35 (4); 1 Halsbury's Statutes 104.

(*q*) Hosiery Act, 1843, s. 18; 19 Halsbury's Statutes 629.

(*r*) Railway Rolling Stock Protection Act, 1872.

(*s*) Sale of Farming Stock Act, 1816, s. 6; 1 Halsbury's Statutes 51.

(*t*) (Gas) Gasworks Clauses Act, 1847, s. 14 and Gasworks Clauses Act, 1871, s. 18; 8 Halsbury's Statutes 1221, 1267. (Electric light) Electric Lighting Act, 1882, s. 25 and Electric Lighting Act, 1909; 7 Halsbury's Statutes 696, 744. (Water) Waterworks Clauses Act, 1863, s. 14 and Waterworks Clauses Act, 1847, s. 44; 20 Halsbury's Statutes 223, 201.

- 7.—Goods of Ambassadors (*u*).
- 8.—Goods of undertenants, lodgers, and other persons (*v*).
- 9.—Goods of person in receipt of sickness benefit on certificate of medical officer, that distress would endanger life (*w*).

B.—QUALIFIED PRIVILEGE

By qualified privilege from distress is meant a privilege which is only available to protect the goods in question when there is, apart from them, sufficient distress on the premises to satisfy the distraint.

The following classes of goods enjoy this qualified exemption. The burden of proof is on the landlord to show that there was no other sufficient distress (*x*).

I. BY COMMON LAW

Tools and implements of trade (*y*).

2. BY STATUTE

- 1.—Beasts of the plough and sheep, etc. (*z*).
- 2.—Growing crops sold under an execution (*a*).
- 3.—Agisted live stock.

(C) DISTRESS—WHERE, WHEN AND HOW

A distress may also be illegal by reason of the time or place of the levy or of the manner of entry.

(*u*) Diplomatic Privileges Act, 1708, s. 3 ; 3 Halsbury's Statutes 504.

(*v*) See *ante*, p. 179 *et seq.*

(*w*) National Health Insurance Act, 1924, s. 102 ; 20 Halsbury's Statutes 556.

(*x*) *Nargett v. Nias* (1859), 1 E. & E. 439 ; 18 Digest 297, 331.

(*y*) See *ante*, p. 201.

(*z*) 51 Hen. 3 Stat. 4 ; 5 Halsbury's Statutes 139.

(*a*) Landlord and Tenant Act, 1851, s. 2 ; 10 Halsbury's Statutes 330, and Agricultural Holdings Act, 1908, s. 29 (1) (repealed).

I.—Time

A landlord may not distrain until the rent is in arrear, which is not until after the last moment of the day on which it is due (*b*), and, therefore, he cannot distrain until the following day. A distress can only be levied between the hours of sunrise and sunset (*c*), and not on a Sunday(*d*).

At Common Law the landlord could only distrain during the continuance of the demise, and the determination of the tenancy by re-entry under a proviso, or by forfeiture, extinguished the right to distrain (*e*). Now by the Landlord and Tenant Act, 1709, s. 6 (*f*), distress may be made for "rent in arrear or due upon any lease for life or lives or for years or at will (*g*) ended or determined . . . after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined: provided that such distress be made within the space of six calendar months after the determination of the lease and during the continuance of such landlord's title or interest and during the possession of the tenant from whom such arrears became due."

The Act only applies where the lease is determined by effluxion of time or (probably) by notice to quit (*h*), or (possibly) by surrender (*i*) but not where it has been

(*b*) *Dibble v. Bowater* (1853), 2 E. & B. 564; 18 Digest 310, 452.

(*c*) *Tutton v. Darke* (1860), 5 H. & N. 647; 18 Digest 310, 458.

(*d*) Sunday Observance Act, 1677, s. 6; 4 Halsbury's Statutes 327. *Werth v. London & Westminster Loan & Discount Co.* (1889), 5 T.L.R. 521; 18 Digest 311, 462.

(*e*) *Williams v. Stiven* (1846), 9 Q.B. 14; 18 Digest 312, 471, and see *ante*, p. 197.

(*f*) 10 Halsbury's Statutes 320.

(*g*) Probably includes a tenancy from year to year. See *Clayton v. Blakey* (1798), 8 T.R. 3; 30 Digest 468, 1309. The shorter periodical tenancies are not affected. See Foá, *Landlord & Tenant*, 6th Ed., p.576.

(*h*) *Doe v. Williams* (1835), 7 C. & P. 322; 18 Digest 314, 484; *Grimwood v. Moss* (1872), L.R. 7 C.P. 360; 18 Digest 313, 482.

(*i*) *Lewis v. Davies*, [1913] 2 K.B. 37; reversed on another point, [1914] 2 K.B. 469, C.A.; 18 Digest 345, 805.

determined by the tenant's wrongful act or by forfeiture (*j*).

The tenant must continue in actual possession but not under a new right or title (*k*).

The tenant's possession is not conclusively proved by his leaving some goods on the premises (*l*), unless by the custom of the district such leaving amounts to an extension of the tenancy (*m*).

The right of distress continues so long as there is a reversion in the distrainor, but no longer (*n*), and, therefore, not after the lessor's title has been extinguished by the Statute of Limitations.

II.—Place

By the Common Law, the landlord had a right to distrain only upon the lands demised, out of which the rent issued (*o*), and by the Statute of Marlborough it is unlawful to make a distress out of the fee, or in the King's highway or in the common street. There are, however, exceptions to this rule.

For instance, by express agreement between the parties the landlord may distrain on other lands (*p*), and he may distrain cattle of the tenants feeding on any common appendant or appurtenant or in any way belonging to the premises demised (*q*), and if the tenant in order to avoid distress drives his cattle off the land demised, he may

(*j*) *Doe v. Williams*, *supra*.

(*k*) *Nuttall v. Staunton* (1825), 4 B. & C. 51; 18 Digest 313, 479; *Wilkinson v. Peel*, [1895] 1 Q.B. 516; 18 Digest 313, 481.

(*l*) *Taylorson v. Peters* (1837), 7 Ad. & El. 110; 18 Digest 313, 480.

(*m*) *Beavan v. Delahay* (1788), 1 Hy. Bl. 5; 18 Digest 312, 476.

(*n*) Co. Litt. 47 (a).

(*o*) *Lewis v. Read* (1845), 13 M. & W. 834; 18 Digest 332, 664; *Capel v. Buszard* (1829), 6 Bing. 150, Ex. Ch.; 18 Digest 269, 72.

(*p*) *Daniel v. Stepney* (1874), L.R. 9 Ex. 185, Ex. Ch.; 18 Digest 315, 507.

(*q*) Distress for Rent Act, 1737, s. 8; 5 Halsbury's Statutes 146.

make "fresh pursuit" and seize them anywhere off the lands (r).

The most important exception arises in the case of "fraudulent removal" *i.e.*, where the tenant fraudulently or clandestinely removes his goods to avoid a distress. In this case the landlord may within thirty days of the removal, seize them wherever they may be found, provided they have not already been *bona fide* sold for value (s).

It is to be noted that this Act applies to the goods of the tenant only (t), and, therefore, hired goods and goods let under normal forms of hire-purchase agreement, are not affected.

For fuller details of these exceptions reference should be made to the textbooks on the subject.

III.—Manner of Entry

The entry into the premises for the purpose of distress must be made in a lawful manner and at a lawful time or the distress will be bad and a trespass *ab initio* (u). "A landlord may enter the demised premises to levy a distress and may commit in so doing, an act which in anyone else would be a trespass, provided he does not break open any outer door" (v).

The outer door may be opened in the ordinary way in which persons are accustomed to open it when it is left so as to be accessible to those having occasion to go into the premises (w).

The latch may be lifted, a staple placed in the door to

(r) Co. Litt. 161 (a).

(s) Distress for Rent Act, 1737, s. 1; 5 Halsbury's Statutes 143.

(t) *Thornton v. Adams* (1816), 5 M. & S. 38; 18 Digest 362, 1000. See also *Postman v. Harrell* (1833), 6 C. & P. 225, N.P.; 18 Digest 362, 1002; *Fletcher v. Marillier* (1839), 9 Ad. & El. 457; 18 Digest 362, 1001; *Tomlinson v. Consolidated Credit & Mortgage Corpn.* (1889), 24 Q.B.D. 135; 18 Digest 363, 1008.

(u) *Attack v. Bramwell* (1863), 3 B. & S. 520; 18 Digest 334, 692.

(v) *Long v. Clarke*, [1894] 1 Q.B. 119, C.A., *per* Lopes, L.J., at p. 122; 18 Digest 333, 676.

(w) *Ryan v. Shilcock* (1851), 7 Ex. 72, 75; 18 Digest 334, 688.

keep it closed but not fastened, may be withdrawn and an outside bolt drawn (x).

An outer door must not be broken (y) nor the door of a warehouse, barn, stable or building whether inside the curtilage or not (z). An inner door, however, may be broken (a).

Entry may be effected through an open window (b) or skylight (c) and if partially open, it may be further opened (d), but if closed, but not fastened, it may not be opened (e).

Gates or enclosures may not be broken down (f), but they may be climbed over (g). Where the landlord and tenant are tenants in common of a partition between their respective premises, the landlord may remove the partition for the purpose of distraining, as one tenant in common cannot bring trespass against another. This was decided in a curious case where the landlord took up the flooring of his room over the demised premises, the flooring also forming the ceiling of the room below, in order to get down into the room and distrain (h).

If a landlord has entered lawfully but has been forcibly ejected, he may return and break in, even after a

(x) *Ryan v. Shilcock* (*supra*). The headnote of this case is misleading, as it would suggest that a key might be inserted from the outside and the door opened. Such a case has never been reported. If the key was in the lock and outside the door, presumably it might be turned by the landlord for the purpose of entering, as the door would not be fastened with the intention of keeping persons out.

(y) *Semayne's* case (1604), 5 Co. Rep. 91; 21 Digest 477, 569; *American Concentrated Must Corp'n. v. Hendry* (1893), 62 L.J. Q.B. 388, C.A.; 18 Digest 334, 685.

(z) *Long v. Clarke*, *supra*, per Esher, M.R.

(a) *Browning v. Dann* (1736), Buller, Nisi Prius, 7th Ed., 81; 18 Digest 334, 689.

(b) *Nixon v. Freeman* (1860), 5 H. & N. 652; 18 Digest 335, 694; *Long v. Clarke*, *supra*.

(c) *Miller v. Tebb* (1893), 9 T.L.R. 515, C.A.; 18 Digest 335, 696.

(d) *Crabtree v. Robinson* (1885), 15 Q.B.D. 312; 18 Digest 335, 695.

(e) *Ibid.*; *Nash v. Lucas* (1867), L.R. 2 Q.B. 590; 18 Digest 334, 693.

(f) Co. Litt. 161(a).

(g) *Eldridge v. Stacey* (1863), 15 C.B.N.S. 458; 18 Digest 357, 941; *Long v. Clarke*, *supra*.

(h) *Gould v. Bradstock* (1812), 4 Taunt. 562; 18 Digest 333, 681.

considerable time has elapsed (*i*), provided there has been no abandonment of the distress (*j*).

And in the case of a fraudulent removal, a landlord may with the assistance of a constable, forcibly break in to premises where he reasonably suspects goods have been fraudulently placed to avoid a distress, and seize them (*k*).

Loss of Right to Distrain.—A distress may also be illegal because the right to distrain has been lost, *e.g.*, by payment of the rent (*l*), by tender of the rent (*m*), by a previous distress for the same rent (*n*), by merger of the right in a judgment for rent (*o*), by determination of the lessor's interest (*p*), and by expiration of the tenancy (*q*).

A tender in order to be effectual to defeat a landlord's right to distrain must be unconditional (*r*), of the correct amount (*s*) and to the proper person (*t*).

There are qualifications to the rule that no second distress may be made for the same rent, *e.g.*, where the landlord has made a *bona fide* mistake as to the value of the goods distrained (*u*), or where the tenant has himself

(*i*) *Eagleton v. Gutteridge* (1843), 11 M. & W. 465 ; 18 Digest 275, 132.

(*j*) *Russell v. Rider* (1834), 6 C. & P. 416 ; 18 Digest 335, 701.

(*k*) Distress for Rent Act, 1737, s. 7 ; 5 Halsbury's Statutes 145. The landlord must strictly comply with the provisions of the Act which should be referred to.

(*l*) See *ante*, p. 196. But not by the acceptance by the landlord of a bill or note for the rent ; *Davis v. Gyde* (1835), 2 Ad. & El. 623 ; 18 Digest 324, 583 ; *Parrott v. Anderson* (1851), 7 Exch. 93 ; 18 Digest 323, 579 ; though it may be some evidence of an agreement by the landlord not to distrain during the currency of the instrument.

(*m*) *Bennett v. Bayes* (1860), 5 H. & N. 391 ; 18 Digest 325, 591.

(*n*) *Dawson v. Cropp* (1845), 1 C.B. 961 ; 18 Digest 357, 944.

(*o*) *Chancellor v. Webster* (1893), 9 T.L.R. 568 ; 18 Digest 322, 560 ; *Potter v. Bradley & Co.* (1894), 10 T.L.R. 445 ; 18 Digest 322, 561.

(*p*) See *ante*, p. 198.

(*q*) See *ante*, p. 204.

(*r*) *Roscoe*, N.P. 712.

(*s*) *Bennett v. Bayes*, *supra*.

(*t*) *Smith v. Goodwin* (1833), 4 B. & Ad. 413 ; 18 Digest 357, 943 ; *Hatch v. Hale* (1850), 15 Q.B. 10 ; 18 Digest 326, 607.

(*u*) *Hutchins v. Chambers* (1758), 1 Burr. 579 ; 18 Digest 358, 956.

induced the landlord to withdraw (*v*), a second distress may be levied.

(D) IRREGULAR AND EXCESSIVE DISTRESS

Irregular and Excessive Distress.—A distress, although not wholly wrongful and void *ab initio* by reason of one or more of the matters which have been dealt with in the foregoing pages, may yet, by reason of some irregularity committed, or by the seizure by the landlord or his bailiff, after a legal and proper entry has been effected, of more goods than are necessary to satisfy the rent, give rise to an action for damages for irregular or excessive distress.

In either case, the action may be brought by the real owners of the goods as well as by the tenant (*w*), and, therefore, may concern owners of goods let on hire or hire-purchase.

Originally by the Common Law, any irregularity in carrying out a distress, even after a proper entry and seizure, rendered the whole proceedings nugatory and the distrainer became a trespasser *ab initio* (*x*). Now, by the Distress for Rent Act, 1737 (*y*), irregularities and tortious acts committed after a proper entry and seizure do not avoid the distress but entitle the tenant or other party aggrieved to recover satisfaction for damage actually done and full costs.

Examples of irregular distresses are: Selling without giving a Notice of Distress or without waiting the correct time, or without obtaining the best price as required by section 1 of the Distress Act, 1689 (*z*).

(*v*) *Bagge v. Mawby* (1853), 8 Exch. 641; 18 Digest 358, 951; *Crosse v. Welch* (1892), 8 T.L.R. 709, C.A.; 18 Digest 359, 977; *Wollaston v. Stafford* (1854), 15 C.B. 278; 18 Digest 347, 841; see *Grunnell v. Welch*, [1905] 2 K.B. 650; 18 Digest 334, 686.

(*w*) *Fisher v. Algar* (1826), 2 C. & P. 374; 18 Digest 351, 887; *Wilkinson v. Ibbett* (1860), 2 F. & F. 300; 18 Digest 391, 1326.

(*x*) *Bagshawe v. Goward* (1607), Cro. Jac. 147; 18 Digest 341, 763; *Dod v. Monger* (1704), 6 Mod. Rep. 215; 18 Digest 366, 1045.

(*y*) S. 19; 5 Halsbury's Statutes 150.

(*z*) 5 Halsbury's Statutes 140.

An action of trover cannot be brought against persons who have bought goods sold under a distress which was merely irregular or excessive (a).

(E) IMPOUNDING, RESCUE AND POUNDBREACH

Impounding, Rescue and Poundbreach.—Other matters connected with the Law of Distress are of importance to owners of goods let on hire or hire-purchase, not so much because a knowledge of them will enable them to recover their goods or damages, but because an ignorance of them may lead them into actions which result in their being liable to heavy damages and penalties.

Impounding.—By the Common Law it was necessary that goods should be impounded, after seizure, *i.e.* deposited in a pound overt or covert, off the premises. Now, by the Distress for Rent Act, 1737 (b), goods may be impounded on the premises, where they must remain for five days (or fifteen days at the request of the tenant on giving security (c)), before being sold to satisfy the rent.

Once impounded, goods are within the custody of the Law (d) and this custody prevails both against the tenant and a stranger (e), and it is, therefore, of importance for owners of goods to be able to ascertain when goods are in legal custody, as the removal of them from that

(a) *Whitworth v. Smith* (1832), 5 C. & P. 250; 18 Digest 390, 1310; *Lyon v. Weldon* (1824), 2 Bing. 334; 18 Digest 341, 772.

(b) S. 10; 5 Halsbury's Statutes 147.

(c) Law of Distress Amendment Act, 1888, s. 6; 5 Halsbury's Statutes 158.

(d) *Humphrey v. Barns* (1600), Cro. Eliz. 691; 18 Digest 339, 741; *Washborn v. Black* (1774), 11 East, 405, n; 18 Digest 340, 743; *Firth v. Purvis* (1793), 5 T.R. 432; 18 Digest 367, 1069; *Thomas v. Harries* (1840), 1 Man. & G. 695; 18 Digest 325, 599; *Lodd v. Thomas* (1840), 12 Ad. & El. 117; 18 Digest 326, 600; *Tennant v. Field* (1857), 8 E. & B. 336; 18 Digest 326, 607; *Lavell & Co., Ltd. v. O'Leary*, [1938] 2 K.B. 201, C.A.

(e) Unless possibly the distrainor had so abused the distress by user as to put an end to the custody of the law and the protection of the pound. See *Smith v. Wright* (1861), 6 Hur. & N. 821; 18 Digest 260, 2 Bullen on Distress (2nd Ed.), p. 247; Halsbury's Laws of England (2nd Ed.), Vol. 10, p. 528.

custody, whether the distress was legal or not, would render them liable to an indictment for poundbreach or penal damages (*f*).

When goods are impounded off the premises, no difficulty arises, but it is otherwise when impounded on the premises, as it is now the custom of bailiffs to leave the goods *in situ* on the premises where they happened to be and not to remove them to any special place or room. In such cases no particular act of impounding appears to be necessary, although the Act says that the person "lawfully taking the distress for any kind of rent" may "impound or *otherwise secure* the distress so made . . . in such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding or securing such distress (*g*)."

Impounding is complete when a Notice of Distress is delivered, whether it states that the goods are impounded (*h*) or not (*i*). Apparently no special step is necessary to secure the goods even if left about the premises (*j*). In *Lavell & Co., Ltd. v. O'Leary* (*k*), the Court of Appeal refused to follow the reasoning of Macnaghten, J., to the effect that as between the landlord and a stranger it was necessary to prove some act of impounding or securing the goods other than leaving them *in situ* after a distress.

Once the goods are impounded it is not necessary to leave a man on the premises (*l*). "Walking possession," as it is called, is almost universal, and so long as an intention to remain in possession exists it appears to suffice (*m*). But only such charges as are provided for

(*f*) *Firth v. Purvis*, *supra*; *Lavell & Co., Ltd. v. O'Leary*, *supra*.

(*g*) Distress for Rent Act, 1737, s. 10; 5 Halsbury's Statutes 147.

(*h*) *Thomas v. Harries*, *supra*.

(*i*) *Swann v. Ld. Falmouth* (1828), 8 B. & C. 456; 18 Digest 336, 707; *Tennant v. Field*, *supra*.

(*j*) *Tennant v. Field*, *supra*; *Johnson v. Upham* (1859), 2 E. & E. 250; 18 Digest 326, 605.

(*k*) [1938] 2 K.B. 201, C.A.

(*l*) *Swann v. Ld. Falmouth*, *supra*; *Jones v. Biernstein*, [1899] 1 Q.B. 470; [1900] 1 Q.B. 100, C.A.; 18 Digest 367, 1065.

(*m*) *Lumsden v. Burnett*, [1898] 2 Q.B. 177; 18 Digest 426, 1635.

in the Distress for Rent Rules, 1920, can be made by the bailiff, and any agreement to pay fees, made by the tenant in order to avoid a man being left in possession is invalid, if the fees are not warranted by the Rules (*n*). If a man is not left in possession the bailiff is not entitled to charge on the basis that he was (*n*).

As the authorities stand at present, it would be dangerous for an owner to endeavour to recover goods when once they have been seized and left on the premises, whether or not there is any direct evidence of an impounding beyond the actual seizure. Very slight evidence of the tenant's consent to the goods being impounded in their ordinary position will be accepted by the Court (*o*).

Poundbreach and Rescue.—Poundbreach consists of removing goods from the custody of the law after they have been impounded. It is immaterial whether the goods were wrongfully impounded (*p*).

Rescue consists in removing goods from the possession of the distrainor, after distress but before impounding, but it can be justified where the distress was bad *ab initio* and, therefore, differs in essence from poundbreach (*q*).

In both cases the landlord can pursue and retake the goods wherever he can find them (*r*), so long as he does not commit a breach of the peace and the recapture is on "a fresh pursuit" (*s*).

(*n*) *Day v. Davies*, [1938] 1 All E.R. 686.

(*o*) *Tennant v. Field*, *supra*.

(*p*) *Alwayes v. Broome* (1695), 2 Lut. 1259, at p. 1262; 18 Digest 367, 1058. See also Com. Dig., Vol. III, D2; *Cotsworth v. Betison* (1696), 1 Salk. 247; 18 Digest 366, 1044; *Reddell v. Stowey* (1841), 2 Mood. & R. 358; 18 Digest 366, 1046; But see *St. John's College, Oxford v. Murcott* (1797), 7 T.R. 259; 18 Digest 358, 950.

(*q*) *Parrett Navigation Co. v. Stower* (1840), 8 Dowl. 405; 18 Digest 366, 1052; *Cotsworth v. Betison*, *infra*.

(*r*) *Rich v. Woolley* (1831), 7 Bing. 651; 18 Digest 368, 1071.

(*s*) In a criminal case it has been decided that an interval of two hours between the offence (an assault on a constable) and the return of the constable with assistance to effect the recapture was too long to constitute it "fresh pursuit." *R. v. Walker* (1854), 13 L.J. M.C. 123; 15 Digest 823, 8987. Fresh pursuit should be expressly pleaded. *Rich v. Woolley*, *supra*.

He can also bring a common law action on the case, but he is provided by statute (*t*) with the more valuable right to recover treble damages (*u*). By the Limitations of Actions and Costs Act, 1842 (*v*), he is also entitled to a full and reasonable indemnity as to costs. Both rescue and poundbreach are Common Law misdemeanours.

(F) EFFECT OF SALE

Effect of Sale.—Under the Distress Act, 1689, a landlord may, after five days from the seizure, sell the goods to satisfy the rent. It is, therefore, of interest to owners of goods let on hire or hire-purchase, to appreciate the effect of such a sale on the property in the goods. The purchaser's title to goods bought under a distress, depends upon the above-mentioned Statute, which say that where goods have been "distraigned," the landlord may lawfully sell them.

If the goods have been sold under a wholly illegal distress, it is assumed that no property passes to a purchaser, since they cannot be said to have been "distraigned," although the point has not been directly decided. It was, however, decided in *Grunnell v. Welch* (*w*), that an illegal distress is wholly void, so even as to allow the landlord to distrain subsequently for the same rent. This also appears to be the effect of the numerous cases to the effect that where the place, time, or manner of entry are wrongful, then the distress is a trespass *ab initio* and void.

And where the sale is wholly wrongful, as by a bailiff to recover his expenses after the landlord has received his rent and withdrawn (*x*), or where there has been no

(*t*) The Distress Act, 1689, s. 3 ; 5 Halsbury's Statutes 142.

(*u*) See *Lavell & Co., Ltd. v. O'Leary*, [1938] 2 K.B. 201.

(*v*) S. 2. This is repealed so far as regards cases within the Public Authorities Protection Act, 1893, by s. 2 of that Act ; 13 Halsbury's Statutes 459.

(*w*) [1906] 2 K.B. 555 ; 18 Digest 334, 686.

(*x*) *Harding v. Hall* (1866), 14 L.T. 410 ; 18 Digest 355, 920.

real sale at all (y), the purchaser obtains no title. If there has been merely an irregularity in the proceedings, the purchaser is not deprived thereby of a good title to the goods (z).

The landlord cannot legally purchase the goods himself, even when the sale is by auction (a).

Any surplus after satisfying the rent and expenses of sale must be left in the hands of the sheriff, for the owner's use (b).

SECTION 4—DISTRESS FOR RATES AND TAXES AND FOR FINES

Rates.—Distress may be levied for the non-payment of rates, but the right is limited to the goods of the person assessed (c). Goods on hire or hire-purchase are not in general distrainable for rates owed by the hirer (d), but many local authorities have power under local or private Acts to levy for rates in the same way as a landlord in respect of rent. Enquiry should be made locally as cases arise. If a defaulting ratepayer has granted a bill of sale by way of security for the payment of money, he will be afforded no protection by such bill of sale in respect of the goods included in it (e), and the existence of an equitable charge on chattels does not avail to protect

(y) *King v. England* (1864), 4 B. & S. 782; 18 Digest 352, 898.

(z) *Lyon v. Weldon* (1824), 2 Bing. 334; 18 Digest 341, 772.

(a) *King v. England, supra*; *Moore, Nettlefold & Co. v. Singer Mfg. Co.*, [1904] 1 K.B. 820; 18 Digest 352, 899.

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(c) Poor Relief Act, 1601, s. 2; 14 Halsbury's Statutes 478; Poor Relief Act, 1743, s. 7; 14 Halsbury's Statutes 488; Poor Relief Act, 1814, s. 12; 14 Halsbury's Statutes 496; The Distress Costs Acts, 1817 & 1827; see also Ryde on Rating, 4th Ed., p. 883; *Stevens v. Evans* (1761), 2 Burr. 1152; 18 Digest 396, 1377; see also the Distress for Rates Act, 1849, Sched. Warrant; 14 Halsbury's Statutes 515. But see *Peppercorn v. Hofman* (1842), 9 M. & W. 618; 18 Digest 397, 1386.

(d) See *Prudential Mortgage Co. v. Marylebone Borough Council* (1910), 8 L.G.R. 901; 7 Digest 10, 40.

(e) Bills of Sale Act (1878) Amendment Act, 1882, s. 14; 2 Halsbury's Statutes 106.

them from a distress for poor rate (*f*). Tools of trade, though there are other goods available, and beasts of the plough may be taken in distress for rates (*g*).

Taxes.—The goods of a third person (*e.g.*, the owner of goods let on a hire-purchase agreement), may be taken under a distress for non-payment of certain taxes. Income Tax, Schedules A and B, is charged in respect of the premises, under the other schedules in respect of the person. Where it is charged in respect of the premises, a collector has power to distrain on the premises charged (*h*), and the goods of a third person, though lent to the defaulting taxpayer, may be taken in such distress if they are on the premises (*i*). An implement of trade is not exempt, as the Law of Distress Amendment Act, 1888, does not apply to distress for taxes (*j*). Where the taxes charged are on the person, distress can only be levied on the goods of the person so charged (*k*).

Fines.—Only the goods of the defendant can be taken in distress for an unpaid fine or pecuniary penalty ordered to be paid by a Court of Summary Jurisdiction (*l*).

(*f*) *Re Marriage, Neave & Co.*, [1896] 2 Ch. 663, C.A.; 18 Digest 398, 1387.

(*g*) *Edgecumb v. Sparks* (1680), 2 Show. 126; 18 Digest 397, 1380; *Hutchins v. Chambers* (1758), 1 Burr. 579; 18 Digest 358, 956.

(*h*) Taxes Management Act, 1880, s. 86 (1); 16 Halsbury's Statutes 427. See Income Tax Act, 1918, Schedules; 9 Halsbury's Statutes 532 *et seq.*; see also Konstam, 6th Ed., p. 416.

(*i*) *Juson v. Dixon* (1813), 1 M. & S. 601; 18 Digest 426, 1632, which was a case on the construction of earlier Revenue Acts (43 Geo. 3, cc. 99 and 161), in similar terms; see the judgment of Lord Ellenborough, C.J., at p. 605; *Macgregor v. Clamp & Son*, [1914] 1 K.B. 288; 18 Digest 426, 1633.

(*j*) *Per Bray, J.*, in *Macgregor v. Clamp & Son* (*supra*) at p. 290.

(*k*) Taxes Management Act, 1880, s. 86 (1), *supra*; see also *Shaftesbury (Earl of) v. Russell* (1823), 1 B. & C. 666; 18 Digest 423, 1608.

(*l*) Summary Jurisdiction Act, 1848, s. 19; 11 Halsbury's Statutes 283; see also Summary Jurisdiction Act, 1879, s. 21; 11 Halsbury's Statutes 332.

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SECTION 5—LIEN

(A) GENERALLY

It frequently happens that, during the period covered by a hire-purchase agreement, the hirer allows the goods to pass from his possession to that of a carrier, bailee, inn-keeper or workman, and that the owner of the goods, when he subsequently attempts to regain possession, is met by a claim of lien. The following pages will be devoted to an examination of the various problems resulting from such claims.

Lien is the right of a creditor to retain goods of the debtor until a debt is paid (*m*). It may arise (1) under the Common Law from custom, (2) as a result of a course of dealing between the parties or (3) by express contract. As a general rule it does not arise until possession of the property is obtained by the person claiming the right, and the possession must be rightful (*n*), continuous (*o*) and must not be obtained for a particular purpose (*p*). Such liens are frequently referred to as legal or possessory liens, thereby distinguishing them from equitable liens, with which we are not here concerned, and which arise independently of possession. A lien is a personal right which cannot be assigned (*q*) and cannot be taken in execution (*r*). A lien confers only a right to retain (*s*).

(*m*) *Mulliner v. Florence* (1878), 3 Q.B.D. 484, *per* Bramwell, L.J., at p. 489; 29 Digest 19, 246. See also *Hammonds v. Barclay* (1801), 2 East, 227, *per* Grose, J., at p. 235; 32 Digest 216, 4: "A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied."

(*n*) *Bernal v. Pim* (1835), 1 Gale, 17; 32 Digest 219, 40.

(*o*) *Forth v. Simpson* (1849), 13 Q.B. 680; 32 Digest 220, 51.

(*p*) *Walker v. Birch* (1795), 6 Term R. 258; 32 Digest 226, 104.

(*q*) *Wilkins v. Carmichael* (1779), 1 Doug. K.B. 101; 41 Digest 933, 8230.

(*r*) *Legg v. Evans* (1840), 4 M. & W. 270; 32 Digest 216, 12.

(*s*) *Pelly v. Wathen* (1849), 7 Hare, 351; 32 Digest 225, 97.

Except where there is a usage or a statutory provision to the contrary (*t*), a lien confers no right to sell (*u*).

Legal or possessory liens are of two sorts, general and particular.

General Lien.—A general lien entitles certain persons to retain possession of chattels until all claims or debts or accounts of the possessor against the owner are satisfied.

General liens have frequently been adversely commented on by the Courts (*v*) but many have been established and judicially recognised as part of the Common Law (*w*) *e.g.*, in the case of Solicitors (*x*), Stockbrokers (*y*), Bankers (*z*) and Factors (*a*).

Particular Lien.—A particular lien entitles a person to retain chattels, until the debt or charges in respect only of those particular chattels have been satisfied. The right was originally given by the Common Law to all persons who were under a legal obligation to accept goods (*b*), and subsequently, the right was extended to such persons as received goods for the purpose of expending

(*t*) *E.g.*, the innkeeper's right to sell, given by s. 1 of the Innkeepers' Act, 1878; 9 Halsbury's Statutes 840. The statutory right of sale has also been given in the following cases.

Carriers, in certain cases under Railways Clauses Consolidation Act, 1845, s. 97; 14 Halsbury's Statutes 68. Shipowners, under Merchant Shipping Act, 1894, ss. 494-501; 18 Halsbury's Statutes 352-354.

Vendors of Chattels, under Sale of Goods Act, 1893, ss. 39, 41, 42, 43; 17 Halsbury's Statutes 633, 634. Dock Companies, under Harbours, Docks & Piers Clauses Act, 1847, s. 45; 18 Halsbury's Statutes 60.

(*u*) *Lickbarrow v. Mason* (1793), 6 East, 20, n., H.L., *per* Buller, J., at p. 24, n.; 32 Digest 215, 3; *Thames Iron Works Co. v. Patent Derrick Co.* (1860), 1 J. & H. 93; 32 Digest 224, 90; *Mulliner v. Florence* (1878), 3 Q.B.D. 484, C.A.; 29 Digest 19, 246.

(*v*) Lord Ellenborough referred to them as an "encroachment upon the Common Law" in *Rushforth v. Hadfield* (1806), 7 East, 224; 32 Digest 242, 277.

(*w*) *Brandao v. Barnett* (1846), 12 Cl. & Fin. 787, 805, H.L.; 32 Digest 227, 111.

(*x*) *Pelly v. Wathen* (1851), 1 De G. M. & G. 16, *per* Lord Cranworth, L.J., at p. 23; 32 Digest 225, 91; *Wilkins v. Carmichael*, *supra*.

(*y*) *Re London & Globe Finance Corporation*, [1902] 2 Ch. 416, *per* Buckley, J., at p. 420; 32 Digest 241, 265.

(*z*) *Davis v. Bowsher* (1794), 5 Term Rep. 488; 3 Digest 289, 899.

(*a*) *Bock v. Gorissen* (1860), De G. F. & J. 434; 32 Digest 227, 124.

(*b*) *Robins & Co. v. Gray*, [1895] 2 Q.B. 501, C.A.; 29 Digest 19, 240.

skill or time in improving them (c). It is in these cases that the problems in connection with goods on hire or hire-purchase generally arise. A great many cases of particular liens have been established in the Courts in the course of time, but it is only necessary here to deal with the more important.

In those cases in which the law has imposed upon persons the legal obligation to accept goods, it has given them a correspondingly complete protection in a lien which is enforceable against the world, and it is immaterial to whom the goods really belong (d), unless the person claiming the lien knew that the person from whom he received them was wrongfully in possession of them (e). In this class of lien (*inter alia*) are the Innkeeper's and Carrier's Liens.

In all other cases the right to create a lien must be derived from legitimate authority, express or implied (f). This will be discussed more fully when dealing with Repairer's or Workman's Lien (g).

(B) CARRIER'S LIEN

The Common Carrier.—Every common carrier has a lien on the goods he carries for the price of the carriage (h), and this right exists, though the goods may not have been

(c) *Jackson v. Cummins* (1839), 5 M. & W. 342; 32 Digest 248, 328.

(d) *Cassils & Co., etc. v. Holden Wood Bleaching Co.* (1914), 84 L.J. K.B. 834, C.A.; 32 Digest 240, 245; *Exeter Carrier's Case*, cited in *Yorke v. Grenough* (1703), 2 Ld. Raym. 866, at p. 867; 8 Digest 220, 1402.

(e) *Johnson v. Hill* (1822), 3 Stark. 172, N.P.; 32 Digest 220, 47.

(f) *Hiscox v. Greenwood* (1802), 4 Esp. 174; 32 Digest 247, 376; *Buxton v. Baughan* (1834), 6 C. & P. 674, 675; 32 Digest 220, 48; *Cassils & Co., etc. v. Holden Wood Bleaching Co.*, *supra*; *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307, C.A.; Digest Supp.

(g) See later, p. 221.

(h) *Skinner v. Upshaw* (1702), 2 Ld. Raymond 752; 8 Digest 219, 1397.

delivered to him by the real owner (*i*). This is a particular lien for the freight only (*j*). The Common Law gives the carrier no lien upon the goods for a general balance of account (*k*), although he may acquire this right by express contract or by a long course of dealing between the parties (*l*). The Common Law looks with disfavour, however, on any such extension of the right which must be strictly proved (*m*). The carrier cannot charge for warehousing while he is exercising his lien (*n*). Apart from special contract, the carrier has no right to sell goods upon which he is exercising his lien. There is a statutory exception, however, in that a Railway Company may detain and sell the railway carriage of any person, and the goods contained therein, on failure to pay the charges for the haulage of the carriage (*o*).

(C) BAILEE'S LIEN

As a general rule a bailee for reward has no lien for his charges on the goods entrusted to his care, so long as they are so entrusted for safe custody only and not for

(*i*) *Exeter Carrier's Case*, cited in *Yorke v. Grenaugh* (1703), 2 Ld. Raym. 866, at p. 867; 8 Digest 220, 1402. This case is here reported by Lord Raymond as having been cited by Chief Justice Holt: "A. stole goods and delivered them to the Exeter carrier to be carried to Exeter; the right owner finding the goods in possession of the carrier demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held that he might justify detaining against the right owner for the carriage; for when A. brought them to him he was obliged to receive them and carry them; and, therefore, since the law compelled him to carry them it will give him remedy for the premium due for the carriage."

(*j*) *Lambert v. Robinson* (1793), 1 Esp. 119; 8 Digest 220, 1399.

(*k*) *Rushforth v. Hadfield* (1806), 7 East, 224; 8 Digest 220, 1408; *Wright v. Snell* (1822), 5 B. & Ald. 350; 8 Digest 221, 1411.

(*l*) *Aspinall v. Pickford* (1800), 3 Bos. & P. 44, n.; 8 Digest 220, 1406.

(*m*) *Rushforth v. Hadfield*, *supra*.

(*n*) *Somes v. British Empire Shipping Co.* (1860), 8 H.L. Cas. 338; 32 Digest 253, 390.

(*o*) Railways Clauses Consolidation Act, 1845, s. 97; 14 Halsbury's Statutes 68.

improvement by being worked upon or repaired (*p*). Repairer's or workman's lien will be discussed later.

Factors, bankers, stockbrokers and wharfingers, and possibly also warehousemen (*q*), have, however, by implication of law, a right of general lien in respect of their charges.

Where a bailee has a lien on a chattel, he cannot charge for keeping it while he is enforcing his lien (*r*), nor can he enlarge a particular lien to include a general balance of account (*s*). If a bailee claims to hold a chattel for a sum greater or different from the sum actually due (unless he makes an alternative claim for the right amount), not only does he lose his lien, but the bailor on demand of the chattel and tender of the right amount due, may maintain trover against the bailee (*t*).

A railway company has a lien upon goods deposited in its cloakroom for the cloakroom charges (*u*). In the important case of *Singer Manufacturing Company v. L. & S. W. R. Company* (*u*), it was decided by a Divisional Court that this right arose out of the railway company's obligations under the Railway & Canal Traffic Act,

(*p*) *Jackson v. Cummins* (1839), 5 M. & W. 342 ; 32 Digest 248, 328 ; *Scarfe v. Morgan* (1838), 4 M. & W. 270 ; 32 Digest 233, 180. See also *Judson v. Etheridge* (1833), 1 C. & M. 743 ; 32 Digest 248, 327 ; *Orchard v. Rackstraw* (1850), 9 C.B. 698 ; 32 Digest 253, 389.

(*q*) *R. v. Humphery* (1825), M'Cle. & Y. 173 ; 32 Digest 242, 271 ; *Hill & Sons v. London Central Markets Cold Storage Co., Limited* (1910), 102 L.T. 715 ; 32 Digest 230, 149. It is suggested, however, that in both these cases the bailee was in fact a wharfinger ; and see *Leuckhart v. Cooper* (1836), 3 Bing. N.C. 99 ; 32 Digest 241, 266, which is a strong decision to the contrary. In a Canadian case, *Smith (D.A.), Ltd. v. Campbell* (1911), 16 B.C.R. 505 ; 32 Digest 242, 269 *i*, it was decided that a warehouseman was not entitled to a lien as against the owner, on goods which had been let under a hire-purchase agreement and subsequently deposited by the hirer. For statutory definition of warehouseman, see Merchant Shipping Act, 1894, s. 492 ; 18 Halsbury's Statutes 350.

(*r*) *Somes v. British Empire Shipping Co.*, *supra* ; *Bruce v. Everson* (1883), Cab. & Ell. 18 ; 32 Digest 253, 392.

(*s*) *Scarfe v. Morgan* (*supra*).

(*t*) *Scarfe v. Morgan* (*supra*) ; *Jones v. Tarleton* (1842), 9 M. & W. 675 ; 32 Digest 233, 181.

(*u*) *Singer Manufacturing Co. v. L. & S. W. R. Co.*, [1894] 1 Q.B. 833 ; 8 Digest 220, 1398.

1854 (v) to afford reasonable facilities for receiving, forwarding, and delivering traffic, of which facilities a cloakroom was one. It was, therefore, good against even the true owner of the goods, who had let them on the hire-purchase system to a person who deposited them in the cloakroom without the owner's knowledge, on the same principles as applied to common carriers. It was also put by Collins, J., on the alternative ground, that the hirer, at the time he deposited the article—(a sewing machine)—was entitled to possession of it and to all reasonable user of it, including the right to deposit it in a cloakroom, and thereby to give rights to the railway company which could not be defeated by the mere determination of the hire-purchase agreement afterwards. The learned judge was in effect, basing this part of his judgment on an "implied authority" given by the owners to the hirer under the agreement, to create a lien.

This was referred to in *Pennington v. Reliance Motor Works, Limited* (w), as the "extreme limit" to which the principle of "implied authority" could be carried, although it will be seen later, that the Court of Appeal has carried it still further (x).

(D) WORKMAN'S LIEN

At Common Law, a workman to whom goods are delivered to be worked upon, *e.g.*, to be repaired, or to be otherwise improved, has a lien on such goods for his remuneration for such work (y), although there be an agreement as to the price of such repairs or improvements

(v) S. 2; 14 Halsbury's Statutes 108.

(w) [1923] 1 K.B. 127, at p. 129, *per* McCardie, J.; 32 Digest 248, 324.

(x) *Albemarle Supply Co., Limited v. Hind & Co.*, [1928] 1 K.B. 307, C.A.; Digest Supp.

(y) *Scarfe v. Morgan* (1838), 4 M. & W. 270, *per* Parke, B., at p. 283; 32 Digest 233, 180; *Bleaden v. Hancock* (1829), 4 C. & P. 152, *per* Tindal, C.J., p. 156; 32 Digest 239, 240; *Steadman v. Hockley* (1846), 15 M. & W. 553; 32 Digest 247, 313.

beforehand (z), unless the terms of the agreement are inconsistent with a lien (a) ; but there is no lien, if the sole purpose of the delivery of the goods to the workman is, that he shall work with them and not upon them (b). The workman in exercising this lien can only detain and he has no claim for warehouse charges during such detention (c).

It is of the great importance to owners and to hirers of goods let on hire or hire-purchase and to workmen, repairers and tradesmen generally, to ascertain to what extent the workman's lien is good against the true owner, and it is a question that is continually arising.

The general rule of the Common Law is that *prima facie* no one can create a lien upon another person's goods without his authority (d).

In *Hiscox v. Greenwood* (e) it was decided that a tradesman had no lien on goods delivered to him by the owner's servant without the master's knowledge, as a lien must be derived from legitimate authority. Lord Ellenborough added the words " unless the master has been in the habit of employing the tradesman in the way of his trade." This statement was, however, not necessary for the decision of the case, and it is not easy to understand how a course of business between the master and the trader could affect the authority of the servant to act for the master, unless, indeed, Lord Ellenborough intended to express the opinion, that there would be an exception, if it was the master's habit to employ the tradesman, *through his servant*.

If that was Lord Ellenborough's meaning, it was the first step towards the doctrine that ostensible authority to create a lien is sufficient, and is reconcilable with a

(z) *Chase v. Westmore* (1816), 5 M. & S. 180 ; 32 Digest 222, 64.

(a) *Ibid.*

(b) *Steadman v. Hockley* (*supra*) ; *Bleaden v. Hancock* (*supra*).

(c) *Bruce v. Everson* (1883), Cab. & Ell. 18 ; 32 Digest 253, 392.

(d) See generally the interesting judgment of McCardie, J., in *Pennington v. Reliance Motor Works, Limited*, *supra*.

(e) (1802), 4 Esp. 174 ; 32 Digest 247, 316.

dictum by the same judge in the next case to be discussed on this point, *viz.*, *Hussey v. Christie* (f).

In this case Lord Ellenborough said (g) :—

“ Liens may be derived through the acts of servants or agents acting within the scope of their employment, which they themselves had not. If a servant delivers cloth to a taylor to make his master’s liveries, the taylor indeed will have a lien on the cloth for the value of his work, but though the servant pay the taylor his discharge, that will not give the servant a lien on the liveries.”

In *Hollis v. Claridge* (h), the necessity for authority was again emphasised.

In *Buxton v. Baughan* (i), a phaeton had been delivered to a workman, Mackenzie by name, to be painted, but instead of doing so, he warehoused it for three months with the defendant, who refused to hand it over to the plaintiff, the true owner, unless paid his charges. In the course of the case Alderson, B., said :—

“ If it can be made out that Mackenzie made this bargain as the agent of the plaintiff or by his authority, the claim of lien will be made out.”

And in his summing up, he said :—

“ If you trust your goods into a man’s possession and he makes a bargain about them *without your authority*, you are not bound by that bargain and may reclaim the goods.”

Williams v. Allsup (j) carried the reasoning in support of the sufficiency of implied authority a step further.

Here there was a mortgage of a ship, which remained with the consent of the mortgagees in the possession of the mortgagor, who delivered her to the defendant, a shipwright, for repairs. The defendant claimed a

(f) (1808), 9 East, 426 ; 32 Digest 247, 320.

(g) At p. 433.

(h) (1813), 4 Taunton 807 ; 32 Digest 249, 341. See also *Castellain v. Thompson* (1862), 13 C.B. N.S. 105 ; 32 Digest 247, 318.

(i) (1834), 6 C. & P. 674, N.P. ; 32 Digest 220, 48.

(j) (1861), 10 C.B. N.S. 417 ; 41 Digest 944, 8358.

lien and it was decided that he was right. Willes, J., said (*k*) :—

“ By the permission of the mortgagees the mortgagor has the use of the vessel. He has, therefore, a right to use her in the way in which vessels are ordinarily used . . . this vessel could not be used unless these repairs had been done to her. The state of things, therefore, seems to involve the right of the mortgagors to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright’s lien.”

It will be observed that here, as in the case of *Singer Manufacturing Co. v. L. & S. W. R. Co.* (*l*), the authority to create a lien is said to be derived from the fact that the true owner had allowed the chattels to be in another person’s possession to be used in the ordinary way in which such chattels are used, which implies a right to repair and, therefore, a right to create a lien for the repairs.

In *Keene v. Thomas* (*m*), in which the case of *Singer v. L. & S. W. R. Co.* (*l*) was expressly approved, the implied authority was also held to be derived from a term in a hire-purchase agreement, which obliged the hirer “ to keep and preserve the dog-cart from injury.” It was held that this implied a duty on the hirer to get the dog-cart repaired, if necessary, and, therefore, gave him authority to create a lien for those repairs.

There followed the important decisions of *Cassils & Co., etc. v. Holden Wood Bleaching Co.* (*n*), where it was held that there was no implied authority on the part of persons who received goods for bleaching, to create a lien in favour of sub-contractors to whom these persons had passed on the goods to be bleached, in the absence of express or implied authority so to do or a custom of the trade (*o*).

(*k*) At p. 427.

(*l*) [1894] 1 Q.B. 833 ; 8 Digest 220, 1398. See *ante*, p. 220.

(*m*) [1905] 1 K.B. 136 ; 32 Digest 247, 321.

(*n*) (1914), 84 L.J. K.B. 834 ; 112 L.T. 373 ; 32 Digest 240, 245.

(*o*) And see *Pennington v. Reliance Motor Works, Limited*, [1923] 1 K.B. 127 ; 32 Digest 248, 324.

Keene v. Thomas (m) was followed in *Green v. All Motors, Limited (p)*, which was a case where a motor-car had been let on a hire-purchase agreement, which contained a clause obliging the hirer "to keep the car in good repair and working condition." The car was sent by the hirer to be repaired by the defendants, without the knowledge of the true owners, and defendants were informed that the car was subject to a hire-purchase agreement. It was held that the repairer was entitled to a lien on the car against the true owners.

After the last mentioned decision, it was the general custom in drafting hire-purchase agreements, to insert in them an express term to the effect that the hirer had no authority to create a lien for repairs. This endeavour to avoid the consequences of that decision has not, however, succeeded. In the recent case of *Albemarle Supply Co. v. Hind & Co. (q)*, taxi-cabs were let under hire-purchase agreements, which contained clauses obliging the hirer (a) not to part with the possession of the cabs without the plaintiff's consent, (b) to keep the cabs in good repair and (c) not to create a lien on them in respect of such repairs. The hirer garaged them with the defendant, who executed repairs on them. It was held that, in spite of the clause in the agreement, the defendant had a lien on the cabs as against the true owner, for these repairs. Scrutton, L.J., said (r) :—

"The owner leaving the cab in the hands of a man who is entitled to use it gives him an implied authority to have it repaired with the resulting lien for repairs. Rowlatt, J., had held in a previous case and the judge below in the present case followed his decision, that a contractual limitation of authority not communicated to the repairer does not limit the implied authority derived from the hirer's being allowed to *possess and use the car*. I agree with this view; if a man is put in a

(p) [1917] 1 K.B. 625; 32 Digest 248, 322.

(q) [1928] 1 K.B. 307; Digest Supp.

(r) At p. 317.

position which holds him out as having a certain authority, people who act on that holding out are not affected by a secret limitation of which they are ignorant, of the apparent authority."

It would seem therefore that the decision here was based on ostensible authority, on a holding out by the plaintiffs that the hirer had authority. It is not easy to discover in what this holding out consisted. It appears that the defendant knew that the taxis were held by the hirer on hire-purchase terms, but did not know the form of the agreements.

If the defendant were so informed by the plaintiffs, the holding out would be obvious, but apart from that possibility, it is difficult to discover in what it consisted. The decision appears to go so far as to say that anyone who intrusts a chattel to a person to be used, impliedly grants authority to that person to create a lien for repair in favour of a third. There seems to be no principle on which it can be confined only to hire-purchase agreements, as it is to be observed that it is not suggested that the lien arises in such cases from any particular custom, and the decision is difficult to reconcile with *Cassils & Co. v. Holden Wood Bleaching Co.* (s), *Pennington v. Reliance Motor Works, Limited* (t) and the earlier cases. It would appear to go sufficiently far to include in its ambit the case of a man lending his car to a friend to go for a specific journey, on which the car breaks down and is left by the friend with a garage proprietor for repairs. It can hardly be suggested that such a lending would, to a reasonable man, suggest any authority to get the car repaired without getting into communication with the owner, and yet, so far as the repairer was concerned, he would have no means of differentiating the case from one where the car was on hire-purchase.

(s) (1914), 84 L.J. K.B. 834 ; 32 Digest 240, 245.

(t) [1923] 1 K.B. 127 ; 32 Digest 248, 324.

(E) INNKEEPER'S LIEN

The Innkeeper.—An innkeeper, by the custom of the realm concerning his ancient trade, has a lien upon the goods which the traveller brings to the inn (*u*), and that lien can be enforced not only against the person who brought the goods to the inn, but against the real owner of them (*v*).

What is an Inn.—As to the establishments which come within the interpretation of the word “inn,” it is a question of fact depending on the particular circumstances in each case. A person may reside permanently at an inn and then the relationship of traveller and innkeeper could scarcely be said to exist; on the other hand, a traveller may put up at a large hotel where many people permanently reside, and yet the relationship between him and the proprietors would be that of traveller and innkeeper (*w*). A boarding or lodging house is not an inn (*x*).

Extent of the Innkeeper's Right.—An innkeeper's lien extends to the goods which he, as an innkeeper, receives as belonging to the guest, whether arriving with or after the guest (*y*). Where the goods are furnished for temporary use of the guest by a third person and are known by the innkeeper to belong to that person, then

(*u*) *Mulliner v. Florence* (1878), 3 Q.B.D. 484; 29 Digest 19, 246.

(*v*) *Robins & Co. v. Gray*, [1895] 2 Q.B. 501; 29 Digest 19, 240; *Gordon v. Silber* (1890), 25 Q.B.D. 491, *per* Lopes, L.J., at p. 492; 29 Digest 20, 259.

(*w*) *Lamond v. Richard*, [1897] 1 Q.B. 541; 29 Digest 6, 58. See *Cunningham v. Philp* (1896), 12 T.L.R. 352; 29 Digest 3, 9, where it was found as a fact that a person who kept a temperance hotel was an innkeeper; and see *Chesham Automobile Supply, Limited v. Beresford Hotel, etc.* (1913), 29 T.L.R. 584; 29 Digest 21, 280.

(*x*) *Thompson v. Lacy* (1820), 3 B. & Ald. 283, at p. 287; 29 Digest 2, 3; *Dansey v. Richardson* (1854), 3 El. & Bl. 144; 29 Digest 3, 17; see also *Scarborough v. Cosgrove*, [1905] 2 K.B. 805; 29 Digest 12, 154.

(*y*) *Robins & Co. v. Gray*, [1895] 2 Q.B. 501; 29 Digest 19, 240.

the innkeeper has no lien upon such goods (z). But it is different where the guest takes the goods with him (a), and the lien attaches to the goods whether they belong to the guest or not (b) unless the innkeeper knows when he receives them that the goods had been wrongfully taken from the owner. The innkeeper's lien will continue, though the guest's right to possession may cease, as where the hiring period terminates (c). The goods must be received by the innkeeper acting as an innkeeper towards the guest, and where the goods are received by the innkeeper not in that capacity (e.g., as warehouseman or livery stable keeper) the lien will not attach (d). The innkeeper's lien is waived if he permits the goods to be taken away by the guest, and he cannot have a lien upon them for a previously incurred debt if they should again come into his possession (e), but occasional absences, such as taking a horse out for exercise and training, does not defeat the innkeeper's lien (f).

Innkeeper's Right to Sell.—At Common Law an innkeeper has no right to sell the goods upon which he exercises his lien (g), but under certain circumstances and upon the observance of certain formalities, this right to

(z) *Broadwood v. Granara* (1854), 10 Ex. 417; 29 Digest 18, 239, where it was held that an innkeeper had no lien on a piano sent to a guest by the plaintiff during his stay at the defendant's hotel, it being known to the defendant that the piano belonged to the plaintiff, and was sent for temporary use by the guest.

(a) *Threfall v. Borwick* (1875), L.R. 10 Q.B. 210; 29 Digest 20, 258, where it was held that an innkeeper had a lien on a piano which the guest took with him to the hotel.

(b) *Robins v. Gray*, *supra*; *Johnson v. Hill* (1822), 3 Stark. 172, N.P.; 29 Digest 21, 265.

(c) *Turrill v. Crawley* (1849), 13 Q.B. 197; 29 Digest 7, 68.

(d) *Smith v. Dearlove* (1848), 6 C.B. 132; 29 Digest 21, 278.

(e) *Jones v. Thurloe* (1723), 8 Mod. Rep. 172; 29 Digest 21, 274.

(f) *Allen v. Smith* (1862), 12 C.B.N.S. 638; affirmed 9 Jur. N.S. 1284, Ex. Ch.; 29 Digest 22, 284.

(g) *Mulliner v. Florence* (1878), 3 Q.B.D. 484; 29 Digest 19, 246; *Thames Iron Works Co. v. Patent Derrick Co.* (1860), 1 John. & H. 93; 32 Digest 224, 90. But there was a special custom in the cities of London and Exeter, permitting a sale under certain circumstances. *Vide Moss v. Townsend* (1612), 1 Bulst. 207; 29 Digest 22, 289.

sell has been conferred upon him by Statute (*h*). The sale cannot take place until six weeks after the lien began ; it must be by auction ; one month before it takes place it must be advertised in a London newspaper and a country newspaper ; and after satisfying the debt and the costs of the sale the innkeeper must, on demand, pay over the balance, if any, to the person who left the goods (*i*). It is to be noted that the Statute does not entitle the owner of the goods as such, to any balance, so that little protection is afforded to the owner of hired goods.

(*h*) Innkeepers Act, 1878; 9 Halsbury's Statutes 840.

(*i*) *Ibid.*, s. 1.

CHAPTER 7

CRIMINAL ACTS AND PROCEEDINGS

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SECTION 1—LARCENY BY THE HIRER

Larceny by a Bailee.—At Common Law a taking of goods was not felonious, if the goods were originally lawfully obtained by the accused person, and a subsequent conversion of them was not larceny, unless there were some new and distinct act of taking, whereby the bailment was determined—as for example, by breaking bulk. But by Statute it is now provided “that a person may be guilty of stealing any such thing” (*i.e.*, thing capable of being stolen) “notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner (a).” A person in possession of goods on hire or hire-purchase who fraudulently converts them may, therefore, be convicted

(a) Larceny Act, 1916, s. 1 (1); 4 Halsbury's Statutes 814.

of larceny, upon an indictment, or summarily, subject to the provisions of section 24 (1) of the Criminal Justice Act, 1925 (b). An infant hirer may be convicted under the above named provisions (c) and so may a married woman (d). It should be noted, that evidence that would be sufficient to establish conversion in a civil action, would not necessarily be enough for a criminal prosecution, and there must be proof of a definite act of conversion at a definite time (e), and intention permanently to deprive the owner of his property, in order to convict a hirer of larceny (f).

SECTION 2—LARCENY BY THE OWNER

Owner can Steal his own Goods.—An owner may be convicted of stealing his own goods from the hirer, if it can be shown that he took them out of the possession of the hirer with the intention of fraudulently charging the bailee with the loss of the goods, or (where the bailee has a right of possession against the owner, *e.g.*, a hirer who has not made any default in his hiring agreement), of depriving the bailee of his special property in the goods (g).

SECTION 3—LARCENY BY THIRD PARTIES

Theft from Hirer.—If the goods are stolen by a third person while in the possession of the hirer, it is

(b) 11 Halsbury's Statutes 411.

(c) *R. v. McDonald* (1885), 15 Q.B.D. 323; 15 Digest 895, 9825.

(d) *R. v. Robson* (1861), Le. & Ca. 93; 15 Digest 895, 9824; any doubt to the contrary raised by *R. v. Denmour* (1861), 8 Cox, C.C. 440; 15 Digest 894, 9823, is now disposed of by the Married Women's Property Act, 1882.

(e) *R. v. Jackson* (1864), 9 Cox, C.C. 505; 15 Digest 895, 9830.

(f) *R. v. Wynn* (1887), 16 Cox, C.C. 231; 15 Digest 887, 9740; *R. v. Medland* (1851), 5 Cox, C.C. 292; 15 Digest 887, 9742. As to what amounts to a fraudulent conversion, see *R. v. Henderson* (1871), 23 L.T. 628; 15 Digest 895, 9833.

(g) *R. v. Wilkinson & Marsden* (1821), Russ. & Ry. 470; 15 Digest 900, 9877; *R. v. Bramley* (1822), Russ. & Ry. 478; 15 Digest 901, 9833; *R. v. Wadsworth* (1867), 10 Cox, C.C. 557; 15 Digest 900, 9878.

theft from the hirer, and the goods may be rightly described as belonging to the hirer (*h*).

SECTION 4—REVESTING OF PROPERTY AND ORDERS OF RESTITUTION

It is provided by section 24 (1) of the Sale of Goods Act, 1893 (*i*), that where goods have been stolen and the offender has been prosecuted to conviction, the property in the goods reverts in the person who was the owner, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in *market overt* or otherwise (*j*). But by section 21, subsection 2, of the same Act (*k*), it is provided, that nothing in that Act should affect the provisions of the Factors Act, or any act enabling the apparent owner of the goods to dispose of them as if he were the true owner thereof, and it was held in *Payne v. Wilson* (*l*), that where goods were let under a hire-purchase agreement which amounted to an agreement to buy within section 9 of the Factors Act, 1889 (*m*), a conviction of the hirer for larceny of the goods by disposing of them to a person who took *bona fide* and without notice of any defect in the seller's title, did not revert the property in the goods in the original

(*h*) *R. v. Belstead* (1820), Russ. & Ry. 411 ; 15 Digest 915, 10071.

(*i*) 17 Halsbury's Statutes 625 ; Appendix D, *post*, p. 339.

(*j*) And see *Horwood v. Smith* (1788), 2 Term Rep. 750 ; 15 Digest 618, 6475 ; *Scattergood v. Sylvester* (1850), 15 Q.B. 506 ; 15 Digest 617, 6468.

(*k*) 17 Halsbury's Statutes 623 ; Appendix D, *post*, p. 338.

(*l*) *Payne v. Wilson*, [1895] 1 Q.B. 653 ; [1895] 2 Q.B. 537 ; 3 Digest 97, 264.

It will be noticed that the decision of the King's Bench Division was reversed on appeal, the defendants no longer contesting the case, owing to the decision of the House of Lords in *Helby v. Matthews*, [1895] A.C. 471 ; 3 Digest 93, 245, which was given after the decision by the Divisional Court. Owing to this decision it could no longer be argued that the agreement (which was identical with that in *Helby v. Matthews*) was an agreement to buy. The case was not argued, and the judgment in the Divisional Court appears to stand, in cases where the agreement is an agreement to buy.

(*m*) 1 Halsbury's Statutes 40 ; Appendix C, *post*, p. 325.

owner, and the latter was not entitled to recover them from a *bona fide* purchaser (*l*). Where the hire-purchase agreement does not amount to an agreement to buy, the property does revest in the owner and an order of restitution may be made (*l*).

Where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods does not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender (*n*).

It is enacted by section 45 of the Larceny Act, 1916 (*o*), as follows :—

“(1) If any person guilty of any such felony as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting or disposing of or in knowingly receiving any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative.

“(2) In every case in this section referred to, the Court before whom such offender is convicted shall have power to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner.

“Provided that where goods as defined in the Sale of Goods Act, 1893, have been obtained by fraud or other wrong means not amounting to stealing, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative by reason only of the conviction of the offender.”

The section does not apply to a valuable security or negotiable instrument, *bona fide* paid transferred or delivered without notice of the larceny (*p*), or to offences dealt with in sections 20, 21 and 22 of the Act (*q*), *i.e.*, in

(*n*) Sale of Goods Act, 1893, s. 24 (2) ; 17 Halsbury's Statutes 625. But the owner may disaffirm the fraudulent transaction and thereby regain a right to the property, even against an innocent holder for value whose title accrued after such revocation.

(*o*) 4 Halsbury's Statutes 838. This Act does not alter the law relating to restitution but reproduces earlier legislation.

(*p*) Larceny Act, 1916, proviso (a) to section 45.

(*q*) 4 Halsbury's Statutes, 825.

the case of any prosecution of a trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods (r).

By the Summary Jurisdiction Act, 1879, section 27 (s), it is enacted, that where an indictable offence is, under the circumstances referred to in the Act, authorised to be dealt with summarily, a conviction for such offence shall have the same effect as a conviction on indictment, and the Court may make similar orders for restitution of property, to those that might have been made, if the conviction had been on indictment.

By the Probation of Offenders Act, 1907 (d), section 1 (4) (t), it is provided that where a probation order is made, it shall have the same effect for the purposes of re-vesting or restoring stolen property or making restitution orders, as a conviction.

An order of restitution can only be made in respect of property identified at the trial as being the subject matter of the charge (u), and against a person in whose hands the goods are at the time of the conviction (v), and such person is entitled to be heard in opposition to the making of the order (w), but cannot appeal from it (x).

The Court is not bound to make an order of restitution in all cases where the necessary conditions are satisfied, as it has a discretion (y), but a refusal will not affect the title of the true owner, who can proceed civilly against the person in whose possession the goods are (z). The Court may order the restitution of the proceeds of stolen goods, where they are in the hands of the convicted

(r) Larceny Act, 1916, proviso (b) to section 45.

(s) 11 Halsbury's Statutes 336.

(t) 11 Halsbury's Statutes 366.

(u) *Rex v. Goldsmith* (1873), 12 Cox, C.C. 594; 15 Digest 619, 6486; *Rex v. Smith* (1873), 12 Cox, C.C. 597; 15 Digest 620, 6499.

(v) *Vilmon v. Bentley* (1886), 18 Q.B.D. 322; 15 Digest 620, 6495; *Horwood v. Smith* (1788), 2 Term Rep. 750; 15 Digest 618, 6475.

(w) *Rex v. Macklin* (1850), 15 J.P. 518; 15 Digest 617, 6466.

(x) *Rex v. Elliott*, [1908] 2 K.B. 452, C.C.A.; 15 Digest 618, 6471.

(y) *Vilmon v. Bentley*, *supra*.

(z) *Scattergood v. Sylvester* (1850), 15 Q.B. 506; 15 Digest 617, 6468.

person (a), but it ought not to do so where the proceeds are in the hands of an innocent third party, who had parted with the stolen goods before the conviction (b).

The prosecution of an offender by the Director of Public Prosecutions has the same effect as though the person concerned had been bound over to prosecute, so far as obtaining the restitution of property is concerned, so long as that person gives all reasonable assistance to the Director (c).

The Criminal Appeal Act, 1907 (d), makes provision for the suspension of the effect of the operation of restitution order, pending an appeal.

Orders may be made against pawnbrokers for the delivery up of goods wrongfully pawned, under the terms of the Pawnbrokers Act, 1872 (e).

Under the Metropolitan Police Courts Act, 1839 (f), within the Metropolitan Police District, upon complaint made by any person claiming to be entitled to the property or possession of any goods not exceeding £15 in value detained by any other person, magistrates may order the goods to be delivered to the owner. But, presumably after the 1st January, 1939, this remedy will not be available for owners seeking to recover from hirers possession of goods let under hire-purchase agreements to which the Hire-Purchase Act, 1938, applies, if one-third of the hire-purchase price has been paid, by reason of section 12 of that Act, which enacts that such an action must be brought in the County Court.

(a) *R. v. Justices of Central Criminal Court* (1886), 18 Q.B.D. 314 ; 15 Digest 621, 6502.

(b) *Lindsay v. Cundy* (1876), 1 Q.B.D. 348 ; 15 Digest 621, 6505.

(c) Prosecution of Offences Act, 1879, s. 7 ; 4 Halsbury's Statutes 698.

(d) S. 6 ; 4 Halsbury's Statutes 729.

(e) S. 30 ; 12 Halsbury's Statutes 696. See also Police (Property) Act, 1897, s. 1 ; 12 Halsbury's Statutes 856.

(f) S. 40 ; 4 Halsbury's Statutes 474. It is believed that certain local acts contain similar provisions.

SECTION 5—OBTAINING GOODS BY FALSE PRETENCES

It is a misdemeanour for a person to obtain chattel, money or valuable security, by any false pretence (g); but to establish the offence, there must be proved an intention to deprive the owner wholly of the property and not merely to obtain the loan of it, and, therefore, for a hirer to obtain from the owner the hire of goods by false pretences, without any intention to deprive the owner wholly of them, is not an offence within the statute (h).

SECTION 6—UNDISCHARGED BANKRUPT OBTAINING CREDIT

If the hirer is an undischarged bankrupt and he obtains credit for more than £10, without informing the owner that he is an undischarged bankrupt, he is guilty of misdemeanour (i), and is liable to be imprisoned for any time not exceeding two years (j). If, therefore, an undischarged bankrupt enters as hirer into a hire-purchase agreement in the form referred to in this book as a *Lee v. Butler* agreement, i.e., an agreement which amounts to an agreement to buy, and after payment of the initial deposit the balance remaining payable is more than £10, the section will apply, but in the case of a normal hire-purchase agreement, i.e., what we have called a *Helby v. Matthews* agreement, it will depend upon the terms of the

(g) Larceny Act (1916), s. 32; 4 Halsbury's Statutes 830.

(h) *R. v. Kilham* (1870), L.R. 1 C.C.R. 261; 15 Digest 982, 10997.

In this case the accused obtained the use of a hack by falsely pretending he had been sent to hire it for another person, and he voluntarily returned it at the end of the day. It is submitted that the intention to deprive the owner wholly of the property would on the face of the agreement be very much stronger in the case of a hire-purchase agreement, more particularly if the agreement amounted to an agreement to buy as in *Lee v. Butler*, [1893] 2 Q.B. 318, C.A.; 3 Digest 92, 241, and it is submitted that in the latter case at least *R. v. Kilham* would not apply.

(i) Bankruptcy Act (1914), s. 155; 1 Halsbury's Statutes 700.

(j) *Ibid.*

agreement, *e.g.*, whether the hire-rent is payable in advance or arrear and whether each instalment is of more than £10. If the periodical payment is payable in advance or is less than £10 in amount, it is submitted that no offence would be committed by a bankrupt hirer entering into the agreement, as he would not be obtaining credit for more than £10. This interpretation of the law was accepted by Sir Gervais Rentoul, K.C., Metropolitan Police Magistrate, in a case which came before him on the 2nd April, 1936, but is not reported. There appears to be no reported case.

A hirer may also commit a kindred offence, *viz.*, that of obtaining credit by false pretences or fraud when incurring any debt or liability, under section 13 of the Debtors Act, 1869 (*k*).

SECTION 7—FORCIBLE ENTRY

It is a misdemeanour both at Common Law (*l*) and by Statute (*m*) to enter forcibly upon any lands and tenements without due warrant of law. This is an offence which hire-traders are very liable to commit when seeking to retake possession of goods let on simple hire or hire-purchase. It has been fully dealt with in Chapter 2 (*n*). It is punishable by fine and imprisonment. Many hire-purchase agreements in the past contained a clause entitling the owner in certain circumstances to enter the hirer's premises in order to retake possession of the hired goods and if necessary to break open inner and outer doors for the purpose. Whether or not such clause is void as being a licence to commit a crime has been discussed in Chapter 2, but now, as regards hire-purchase

(*k*) 1 Halsbury's Statutes 577; cf. *R. v. Smith* (1915), 11 Cr.App. Rep. 81, C.C.A.; 15 Digest 986, 11033.

(*l*) *R. v. Blake* (1765), 3 Burr. 1731; 15 Digest 651, 6967; *R. v. Wilson* (1799), 8 Term Rep. 357; 15 Digest 650, 6955; *R. v. Smyth* (1832), 5 C. & P. 201; 15 Digest 651, 6964.

(*m*) Statute of Forcible Entry, 1381.

(*n*) *Ante*, p. 82.

agreements to which the Hire-Purchase Act, 1938, applies, any such clause in any such agreement made after the passing of the Act is void (*m*).

SECTION 8—HIRE-PURCHASE ACT, 1938

Certain new offences have been created by this Act.

1. It is an offence punishable on summary conviction by a fine not exceeding £10, for any person entitled to enforce a hire-purchase agreement or credit-sale agreement against a hirer or buyer to fail without reasonable cause for one month to supply the hirer or buyer with the prescribed documents and information relating to the agreement (*o*).

2. It is an offence punishable on summary conviction by a fine not exceeding £10 for a hirer to fail without reasonable cause for fourteen days after receipt of a request in writing from the owner to inform the owner where the goods are (*p*).

(*m*) Hire-Purchase Act, 1938, s. 5 ; *post*, p. 283.

(*o*) *Ibid.*, s. 6 ; *post*, p. 285.

(*p*) *Ibid.*, s. 7 ; *post*, p. 287.

CHAPTER 8

CIVIL PROCEEDINGS

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In this chapter it is proposed to deal comparatively briefly with those forms of civil proceedings which are found to arise most frequently in connection with hiring and hire-purchase. They are actions of detinue, trover (or conversion), trespass to goods or land, and actions in respect of illegal, irregular or excessive distresses, or duress of goods, and proceedings under the Hire-Purchase Act, 1938.

SECTION 1—TROVER AND DETINUE

(A) GENERALLY

The distinction between these two forms of action, once of great importance, is now, since the Common Law Procedure Act, 1852, of mainly historical interest.

Detinue.—Detinue is the form of action which lies when there occurs the wrongful detaining by one person of the chattels of another, the gist of the action being the unlawful detention, the wrongful failure or refusal to deliver them up when demanded (*a*). It is an action independent of contract and “founded on tort,” within the meaning of section 47 of the County Courts Act, 1934 (*b*). It appears that where judgment is recovered for the return of specific chattels in the High Court, the plaintiff is entitled to have his costs taxed on the High Court Scale irrespective of value, and section 47 does not apply (*c*).

The wrongful act being the unlawful detention, it is immaterial whether the goods originally came into the defendant's possession lawfully or unlawfully, although this action was originally used mainly against bailees. In the case of detinue, the invariable necessary evidence of the unlawful detention is proof of a demand and a subsequent failure or refusal to deliver (*d*), as the cause of action does not arise until there has been a demand and refusal, whereas in an action of trover, although similar evidence is frequently given as evidence of a conversion where other evidence is lacking, it is not essential, as conversion may be committed by a great variety of acts and may be proved in many different ways, according to the circumstances (*e*).

(*a*) *Clements v. Flight* (1846), 16 M. & W. 42; 43 Digest 465, 10; *Clossman v. White* (1849), 7 C.B. 43; 43 Digest 465, 11; *Gledstane v. Hewitt* (1831), 1 Cr. & Jer. 565; 43 Digest 510, 488.

(*b*) 27 Halsbury's Statutes 112; *Bryant v. Herbert* (1878), 3 C.P.D. 389; 43 Digest 465, 15.

(*c*) *Keates v. Woodward*, [1902] 1 K.B. 532; 13 Digest 491, 418; *Du Pasquier v. Cadbury, Jones & Co.*, [1903] 1 K.B. 104; 43 Digest 532, 682; *Trotter v. Windham & Co.* (1907), 23 T.L.R. 676; 43 Digest 532, 683.

(*d*) *Jones v. Dowle* (1841), 9 M. & W. 19; 43 Digest 514, 517; *Miller v. Dell*, [1891] 1 Q.B. 468; 43 Digest 487, 236; *Clayton v. Le Roy*, [1911] 2 K.B. 1031; 43 Digest 493, 314; *Cullen, Allen & Co. v. Barclay* (1881), 10 L.R. Ir. 224; 43 Digest 488, 251, *vi*.

(*e*) *Edwards v. Hooper* (1843), 11 M. & W. 363; 43 Digest 478, 161; *Grainger v. Hill* (1838), 4 Bing. N.C. 212; 43 Digest 472, 115.

In the case of actions (and it is assumed that in form these actions will be actions in detinue) by an owner to enforce a right to recover possession of goods let under a hire-purchase agreement to which the Hire-Purchase Act, 1938, applies, it is expressly provided by section 10 of the Act that the possession by the hirer of the goods after the owner has made a request in writing for their surrender shall be deemed to be a possession adverse to the owner. This appears to be an attempt to simplify proof of demand and refusal. It is enacted that this provision shall not affect a claim for damages for conversion.

An action of detinue will not lie, even against a bailee who is in breach of a covenant or term to redeliver, until there has been a demand and refusal (*f*).

Trover.—Trover is a form of action which developed later than that of detinue, probably because of the limitations and technicalities of the former. It is a form of action on the case and was based on the fiction, which could not be traversed, that the defendant originally came by the goods by finding and afterwards converted them (*g*). Strictly speaking, trover is the name of the action and conversion the name of the tort which supports the action, but latterly the word conversion has come to be very generally used for both. Trover gives a wider remedy than detinue and lies where one person has deprived another person of his goods, by detaining (*h*), taking (*i*) or appropriating them, or by selling (*j*) or otherwise exercising dominion over them to the deprivation of the owner (*k*), or by destroying them (*l*), delivering

(*f*) *Cullen v. Barclay*, *supra*.

(*g*) *Gordon v. Harper* (1796), 7 Term Rep. 9; 43 Digest 496, 354.

(*h*) *Hartley v. Moxham* (1842), 3 Q.B. 701; 43 Digest 476, 145.

(*i*) *Grainger v. Hill*, *supra*; *Fouldes v. Willoughby* (1841), 8 M. & W. 540; 43 Digest 472, 116.

(*j*) *Blackett v. Lowes* (1814), 2 M. & S. 494; 43 Digest 477, 151; *Mulliner v. Florence* (1878), 3 Q.B.D. 484; 43 Digest 478, 162.

(*k*) *Hollins v. Fowler* (1875), L.R. 7 H.L. 757; 43 Digest 471, 102.

(*l*) *Fouldes v. Willoughby*, *supra*.

them to a third person (*m*), or preventing access to them (*n*).

Both in detinue and conversion the subject matter of the action can only be specific personal chattels (*o*), and these actions cannot be brought for money, unless it can be specifically identified (*p*).

Neither of these actions will lie for fixtures, so long as they are attached to and part of the freehold (*q*).

Both in the case of trover and detinue it is essential in order to support the action, that the plaintiff should have some right of property in the goods and in addition the right to the immediate possession of them (*r*). In *Gordon v. Harper* (*s*) it was decided that, where furniture let with a house had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff during the currency of the lease, because he did not have in addition to the right of property in the goods the right to the immediate possession of them.

But although the bailor in such a case cannot sue in trover for the wrongful conversion of his goods, he may bring an action where the facts permit, for negligence, and claim damages for permanent injury to his reversion (*t*).

It is necessary for the plaintiff to have some property

(*m*) *Winter v. Bancks* (1901), 84 L.T. 504; 43 Digest 481, 185.

(*n*) *Walker v. Clyde* (1861), 10 C.B. N.S. 381; 43 Digest 483, 198.

(*o*) *Austen v. Craven* (1812), 4 Taunt. 644; 43 Digest 465, 17; *Friedel v. Castlereagh* (1877), 11 I.C. L.R. 93; 43 Digest 466, *a*.

(*p*) 3 Bl. Com. 152; *Orton v. Butler* (1822), 5 B. & Ald. 652; 43 Digest 467, 48; *Foster v. Green* (1862), 7 H. & N. 881; 3 Digest 163, 247.

(*q*) *Mackintosh v. Trotter* (1838), 3 M. & W. 184; 31 Digest 202, 3434; *Roffey v. Henderson* (1851), 17 Q.B. 574; 31 Digest 206, 3465.

(*r*) *Gordon v. Harper* (1796), 7 Term Rep. 9; 43 Digest 496, 354; *Milgate v. Kebbe* (1841), 10 L.J. C.P. 277; 43 Digest 497, 360; *Bradley v. Copley* (1845), 1 C.B. 685; 43 Digest 497, 361; *Barker v. Furlong*, [1891] 2 Ch. 172; 43 Digest 497, 363.

(*s*) *Supra*, and see *Pain v. Whittaker* (1824), Ry. & M. 99; 43 Digest 498, 373; *Jelks v. Hayward*, [1905] 2 K.B. 460; 43 Digest 475, 137; *Nyberg v. Handelaar*, [1892] 2 Q.B. 202; 43 Digest 504, 451; *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565; 43 Digest 510, 488; *Mears v. L.S.W.R.* (1862), 11 C.B. N.S. 850; 3 Digest 111, 356.

(*t*) *Mears v. L. S. W. Ry.*, *supra*; *Hall v. Pickard* (1812), 3 Camp. 187, N.P.; 3 Digest 111, 355.

in the goods to enable him to sue (*u*), but the fact that a plaintiff was in possession whether rightful or not at the time of the wrongful act, is apparently sufficient in an action against a mere wrongdoer, who has no title (*v*). It was said by Collins, M.R., in *The Winkfield* (*v*), "It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law."

And in *Burton v. Hughes* (*w*), it was held that possession under a general bailment was sufficient to entitle a person to maintain trover against a stranger, and that it was not necessary to prove the written agreement under which he held.

If, however, the plaintiff was not in possession of the goods when the act constituting the conversion occurred, then the defendant is entitled to set up the title of a third person, even though he does not claim under it (*x*).

But if a person has parted with the property in the goods at the time of the conversion, he cannot sue in trover (*y*), even if he has parted with the property under a voidable contract induced by fraud, unless he has first repudiated the contract (*z*), and even then he cannot sue

(*u*) *Melling v. Kelshaw* (1830), 1 Cr. & J. 184; 43 Digest 505, 457; *Crocker v. Molyneux* (1828), 3 C. & P. 470; 43 Digest 507, 471; *Holeman v. Karwithy* (1613), 2 Bulst. 1344; 43 Digest 497, 371.

(*v*) *Taylor v. Parry* (1840), 1 Man. & G. 604; 43 Digest 498, 374; *Noriham v. Bowden* (1855), 11 Ex. 70; 43 Digest 498, 376; *Armory v. Delamirie* (1722), 1 Stra. 505; 3 Digest 64, 75; *The Winkfield*, [1902] P. 42; 43 Digest 515, 522; *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405; 43 Digest 498, 377.

(*w*) (1824), 2 Bing. 173; 3 Digest 113, 367. And see *Sutton v. Buck* (1810), 2 Taunt. 302; 3 Digest 112, 360; *Jeffries v. Gt. Western Railway Co.* (1856), 5 E. & B. 802; 3 Digest 64, 76.

(*x*) *Butler v. Hobson* (1838), 4 Bing. N.C. 290; 43 Digest 515, 524; *Gadsden v. Barrow* (1854), 9 Ex. 514; 43 Digest 515, 529; *Leake v. Loveday* (1842), 4 M. & G. 972; 43 Digest 515, 526.

(*y*) *Armstrong v. Allan Bros.* (1892), 67 L.T. 738, C.A.; 3 Digest 105, 308; *Hornblower v. Proud* (1819), 2 B. & Ald. 327; 43 Digest 508, 476; *Emanuel v. Dane* (1812), 3 Camp. 299; 43 Digest 499, 385.

(*z*) *R. v. George* (1901), 65 J.P. 729; 15 Digest 619, 6482.

a *bona fide* purchaser without notice and for value (a), from the fraudulent party.

Bailees.—In the case of a simple bailment without reward, apparently either the bailor or the bailee may sue in trover, the stranger who wrongfully dispossesses the bailee (b), and the bailee is entitled also to sue the owner if the latter wrongfully takes the goods out of the bailee's possession (c). In the latter case, however, the measure of damage will be different, as it will be the value of the bailee's interest in the goods (d), and not the full value of them.

In the case of a bailment for reward (e.g., a hiring or hire-purchase), where a stranger has converted the goods, the bailee, i.e., the hirer, is the proper person to sue as being the person entitled to immediate possession, but if the bailee wrongfully parts with the goods, or acts in a manner so wholly inconsistent with the terms of the bailment that the bailment is determined (e), the bailor (i.e., the owner), becomes entitled to immediate possession and is the right plaintiff against either the wrong-doing bailee or an innocent intermeddler (f).

In the ordinary way a bailee (e.g., a hirer either under a simple hiring) is estopped from disputing the title of the bailor from whom he received the goods (g), and he

(a) Sale of Goods Act, 1893, s. 24; 17 Halsbury's Statutes 625.

(b) *Nicolls v. Bastard* (1835), 2 Cr. M. & R. 659; 3 Digest 113, 364.

(c) *Roberts v. Wyatt* (1810), 2 Taunt. 268; 3 Digest 108, 330.

(d) *Turner v. Hardcastle* (1862), 11 C.B. N.S. 683; 3 Digest 113, 372. And see p. 251 as to measure of damage.

(e) But see *Donald v. Suckling* (1866), L.R. 1 Q.B. 585; 37 Digest 9, 43, which decides that the re-pledge by the pledgee of goods is not wholly inconsistent with the terms of the bailment so as to determine the latter.

(f) *Cooper v. Willomatt* (1845), 1 C.B. 672; 3 Digest 106, 316; *Fenn v. Bittleston* (1851), 7 Ex. 152; 3 Digest 106, 317; *Singer Mfg. Co. v. Clark* (1879), 5 Ex. D. 37; 3 Digest 97, 265; *Helby v. Matthews*, [1895] A.C. 471; 3 Digest 93, 245. But see *ante*, p. 120, for consideration of question how far a sale by a hirer under a hire-purchase agreement in certain forms would be totally inconsistent with the bailment.

(g) *Rogers, Sons & Co. v. Lambert*, (1891) 1 Q.B. 318, C.A.; 3 Digest 101, 285; *Biddle v. Bond* (1865), 6 B. & S. 225; 3 Digest 101, 287. *Anon.* (undated), cited in 3 Esp. 115; 3 Digest 100, 287; *Betteley v. Reed* (1843), 4 Q.B. 511; 3 Digest 101, 283.

may not set up as a defence the right of a third party (*jus tertii*) (*h*) unless the goods have been taken from him by what is equivalent to eviction by title paramount, or he relies on the title of the third party and claims under it (*i*). But if a bailee accepts a bailment of goods with full knowledge of the claim of a third party to them, he cannot afterwards set up and rely upon that third party's claim as a defence to an action by his bailor (*j*). In the extremely important case of *Karflex, Ltd. v. Poole* (*k*), Goddard, J., expressed the view that the doctrine that a bailee is estopped from denying his bailor's title did not apply in the case of a hire-purchase agreement, where the contract of bailment is coupled with an element of sale. In that case the plaintiffs, a finance company, had at the request of Poole, purchased from one King a motor-car and then let it to Poole on a hire-purchase agreement in a usual form. Poole paid £95, in consideration of the option to purchase, but failed to pay the first instalment, and the plaintiffs then retook possession and brought an action to recover a sum payable under the agreement by way of compensation for depreciation. It was then ascertained that King had had no title to the vehicle, and the plaintiffs proceeded to perfect their title by purchasing the interest of the true owners. It was held, however, that there was condition going to the root of the agreement that the plaintiffs were the true owners of the motor-car and entitled to give an option to purchase. That this condition having been broken, the plaintiffs were not entitled to succeed and the defendant was entitled to recover the sum of £95, paid "in consideration of the option to purchase" which the plaintiffs were never in a position

(*h*) *Rogers, Sons & Co. v. Lambert*, [1891], etc. See previous page.

(*i*) *Shelbury v. Scotsford* (1602), *Yelv.* 23; 3 *Digest* 101, 286; *Biddle v. Bond*, *supra*; *Thorne v. Tilbury* (1858), 3 *H. & N.* 534; 3 *Digest* 102, 290. And see *Hunt v. Maniere* (1864), 34 *Beav.* 157; 3 *Digest* 102, 292.

(*j*) *Re Sadler, ex. p. Davies* (1881), 19 *Ch. D.* 86; 3 *Digest* 101, 284.

(*k*) [1933] 2 *K.B.* 251; *Digest Supp.*

to give. In *Mercantile Union Guarantee Corp'n., Ltd. v. Wheatley* (*l*) it was held that this condition was sufficiently fulfilled by the finance company purchasing the goods there in question after the signature of the hire-purchase agreement but before delivery to the hirer.

Hire-Purchase Act, 1938.—This matter has been dealt with by the recent Act and it is provided by section 8 (*b*) that in every hire-purchase agreement to which the Act relates (*m*) there shall be an implied condition on the part of the owner (*n*) that he shall have a right to sell the goods at the time when the property is to pass. This appears to define a condition less extensive than that declared to exist in the two cases before mentioned, but by section 8 (2) 4 of the Act it is provided that nothing in the section shall prejudice the operation of any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

(B) DEMAND AND REFUSAL

It does not amount to a wrongful detention or a wrongful conversion merely to keep a person's goods, without more (*o*). But if the person in possession, without any justification and in an unqualified manner, refuses to deliver them up when properly demanded or acts in a manner from which a refusal will be implied, *e.g.*, by failure to deliver (*p*), he wrongfully detains them and entitles an owner who has the right to immediate pos-

(*l*) (1937), 4 All E.R. 713; Digest Supp.

(*m*) Hire-Purchase Act, 1938, s. 1, and see p. 63.

(*n*) See statutory definition, s. 21 (1); *post*, p. 308.

(*o*) *Isaack v. Clark* (1615), 2 Bulst. 306; 3 Digest 108, 335; *Spackman v. Foster* (1883), 11 Q.B.D. 99; 32 Digest 344, 271; *Miller v. Dell*, [1891] 1 Q.B. 468, C.A.; 43 Digest 487, 236; *Thorogood v. Robinson* (1845), 6 Q.B. 769; 43 Digest 476, 146.

(*p*) *Anthony v. Haney* (1832), 8 Bing. 186; 43 Digest 486, 233; *Aikin v. Slater* (1844), 1 Car. & Kir. 356; 43 Digest 491, 292; *Davies v. Nicholas* (1836), 7 C. & P. 339; 43 Digest 490, 285; *Watkins v. Woolley* (1819), Gow, 69, N.P.; 43 Digest 494, 333.

session to bring an action of detinue, and he also wrongfully converts them to his own use and entitles the owner to bring an action of trover for the conversion (*q*).

Demand.—The demand must be made in respect of specific goods and not generally in respect of all the goods of the person making the demand (*r*), and must be unqualified and unconditional (*s*).

A demand may be oral or in writing (*t*), and if both are made at the same time and they do not refer to one another, evidence may be given of the oral demand without production of the writing (*u*).

The demand must be made by the owner or by some person duly authorised by him (*v*).

Refusal.—Not every refusal to deliver up goods of another, although in fact the person refusing may have no right to them, amounts to evidence of a conversion. A qualified refusal may be justified under certain circumstances, *e.g.*, where the person in possession refuses to deliver them until he has had time to investigate the title of the person demanding (*w*), or being a servant, requires time to get instructions from his master (*x*), or the person demanding is not properly authorised (*y*).

On the other hand, a qualified refusal may well be evidence of conversion, *e.g.*, a refusal to deliver except to one particular person (*z*), or unless paid expenses (*a*), or

(*q*) *Burroughes v. Bayne* (1860), 5 H. & N. 296 ; 43 Digest 471, 106 ; *Jones v. Dowle* (1841), 9 M. & W. 19 ; 43 Digest 514, 517.

(*r*) *Nixon v. Sedger* (1890), 7 T.L.R. 112, C.A. ; 43 Digest 489, 265.

(*s*) *Rushworth v. Taylor* (1842), 3 Q.B. 699 ; 43 Digest 489, 271.

(*t*) See p. 241, *ante*, as to goods let under hire-purchase agreements to which the Hire-Purchase Act, 1938, relates.

(*u*) *Smith v. Young* (1808), 1 Camp. 439 ; 43 Digest 488, 261.

(*v*) *Guntton v. Nurse* (1821), 2 Brod. & Bing. 447 ; 43 Digest 493, 315 ; *Solomons v. Dawes* (1794), 1 Esp. 81 ; 43 Digest 489, 274.

(*w*) *Vaughan v. Watt* (1840), 6 M. & W. 492 ; 43 Digest 492, 312 ; *Clayton v. Le Roy*, [1911] 2 K.B. 1031 ; 43 Digest 493, 314.

(*x*) *Alexander v. Southey* (1821), 5 B. & Ald. 247 ; 34 Digest 187, 1535.

(*y*) *Solomons v. Dawes*, *supra*.

(*z*) *Clendon v. Dinneford* (1831), 5 C. & P. 13 ; 43 Digest 490, 282.

(*a*) *Binstead v. Buck* (1776), 2 Wm. Bl. 1117 ; 43 Digest 491, 302 ; *Loeschman v. Machin* (1818), 2 Stark. 311 ; 43 Digest 491, 303.

given an inventory and receipt (*b*), or paid a just debt (*c*). An absolute refusal by a person, who in fact had a good ground for refusing but did not allege it, may be evidence of conversion (*d*).

And if the defendant bases his refusal on the claims of a third party, whether he claims the goods for himself or not, and the claims of the third party are bad or non-existent, it is evidence of a conversion (*e*).

A wrongful refusal may be substantially cured (except as to special damages occasioned by the refusal and nominal damages), by a subsequent restoration or *bona fide* offer to restore the goods before action brought (*f*).

Persons Liable in Detinue or Conversion.—The ordinary principles of the Common Law, of course, apply with equal force to detention and conversion as to any other form of tort, and accordingly a servant or agent acting within the scope of his authority, may by a refusal to deliver goods, render his master liable in an action of trover or detinue (*g*).

No one can be made liable in trover or detinue unless he has had possession of the goods or their equivalent, *i.e.*, documents of title to them (*h*), but it is no defence to an action of detinue against a bailee, for the bailee to allege that the goods were not in his possession when demanded, if they should have been in his possession, but have been improperly parted with (*i*).

Nor is it a defence for one who ought to produce the

(*b*) *Cobbett v. Clutton* (1826), 2 C. & P. 471; 43 Digest 491, 304.

(*c*) *Sharp v. Pratt* (1827), 3 C. & P. 34; 43 Digest 492, 305.

(*d*) *Thompson v. Trail* (1826), 6 B. & C. 36; 34 Digest 490, 280.

(*e*) *Wilson v. Anderton* (1830), 1 B. & Ad. 450; 43 Digest 493, 316; *Jennings v. Walker & Hawes* (1839), 3 J.P. 504; 43 Digest 493, 318; *Atkinson v. Marshall* (1842), 12 L.J. Ex. 117; 43 Digest 493, 319.

(*f*) *Hayward v. Seaward* (1832), 1 Moo & S. 459; 43 Digest 490, 284.

(*g*) *Jones v. Hart* (1698), 2 Salk. 441; 34 Digest 123, 944; *Glover v. L.N.W.R.* (1850), 5 Ex. 66; 34 Digest 156, 1279; *Pothonier v. Dawson* (1816), Holt, N.P. 383; 43 Digest 490, 278.

(*h*) *Jones v. Dowle* (1841), 9 M. & W. 19; 43 Digest 514, 517; *Hinchcliffe v. Sharpe* (1898), 77 L.T. 714; 43 Digest 495, 345.

(*i*) *Jones v. Dowle*, *supra*; *Reeve v. Palmer* (1858), 5 C.B. N.S. 84; 43 Digest 519, 568.

goods of the man who has the title to them to allege that the conversion took place before the accrual of his title (*j*).

If two or more persons act in concert in doing what amounts to conversion, they may be sued jointly (*k*).

Since the passing of the Law Reform (Married Women & Tortfeasors) Act, 1935, the husband of a married woman is not by reason only of his being her husband liable in respect of any tort committed by her whether before or after marriage, and therefore is no longer liable for acts of conversion or wrongful detention committed by her (*l*).

(C) MEASURE OF DAMAGES

Detinue.—In an action of detinue, the plaintiff's claim is for an order for the return of the goods in question and damages for their detention, or if they cannot be returned, for their value. Before the Common Law Procedure Act, 1854 (*m*), a judgment in detinue gave the defendant the option of returning the goods or in the alternative, paying the assessed value of them, but section 78 of that Act gave the Courts power to compel him to give them up, and now by R. S. C. Order 48, r. 1, judgment may be given for the delivery up of a specific chattel without the option of paying the value instead, and without any assessment of value (*n*). A similar rule applies in the County Court, *viz.*, County Court Rules, 1936, O. XXV, r. 74 (1) (o). This power is discretionary and the

(*j*) *Bristol, etc., Bank v. Midland Rlwy. Co.*, [1891] 2 Q.B. 653; 43 Digest 500, 397.

(*k*) *Lee v. Bayes* (1856), 18 C.B. 599; 3 Digest 115, 388; *Atkin v. later* (1844), 1 Car. & Kir. 356; 34 Digest 491, 292.

(*l*) Law Reform (Married Women & Tortfeasors) Act, 1935, s. 3; 28 Halsbury's Statutes 106.

(*m*) Now repealed.

(*n*) Also R.S.C.O. XIV, r. 1 (c). And see *Hymas v. Ogden*, [1905] 1 K.B. 246; 21 Digest 584, 1617; *Ivory v. Cruikshank*, [1875] W.N. 249; 21 Digest 584, 1609.

(*o*) And see *Bailey v. Gill*, [1919] 1 K.B. 41; 13 Digest 517, 668.

plaintiff cannot insist on its exercise as an absolute right (*p*).

Failure to comply with the order for delivery up of the specific chattel may be enforced by attachment (*q*).

In addition, the plaintiff can recover actual loss occasioned by the detention, if not too remote (*r*).

Where the value is assessed in the case of detinue, it is so assessed at the date of the judgment, but if the value has diminished during the wrongful detention, damages may be given in respect of this diminished value (*s*), but there must be some evidence of value (*t*).

The question sometimes arises, whether the rule that where the defendant has an interest in the goods the measure of damages is limited to the plaintiff's interest in them, applies in actions of detinue as well as in actions of conversion, and there is a statement in the judgment of Salter, J., in *Whiteley v. Hilt* (*u*) in the Divisional Court supporting that view. He cites no authority for the proposition, and the judgments in the Court of Appeal (*v*) overruling the decision in the Divisional Court, while not expressly dealing with the point, are partly based on the fact that the plaintiff having sued alternatively in conversion, as well as in detinue, the defendant was entitled to take him at his word and pay money into Court, in answer to the claim in conversion (*w*).

It is submitted that the inference to be drawn from the words of these judgments is that the Court of Appeal would not have supported the proposition as framed by Salter, J.

(*p*) *Whiteley v. Hilt*, [1918] 2 K.B. 808, at pp. 819 & 824; 13 Digest 529, 809; *Dowling v. Betjemann* (1862), 2 J. & H. 544; 43 Digest 533, 696; *Cohen v. Roche*, [1927] 1 K.B. 169; Digest Supp.

(*q*) C.C.R.O. XXV, r. 74 (2), and see *Hymas v. Ogden*, *supra*.

(*r*) *Bodley v. Reynolds* (1846), 8 Q.B. 779; 43 Digest 522, 601
Davis v. Oswell (1837), 7 C. & P. 804; 43 Digest 521, 590.

(*s*) *Williams v. Archer* (1847), 5 C.B. 318; 43 Digest 524, 615.

(*t*) *Anderson v. Passman* (1835), 7 C. & P. 193; 43 Digest 526, 627.

(*u*) [1918] 2 K.B. 115, at p. 121; 13 Digest 529, 809.

(*v*) [1918] 2 K.B. 808.

(*w*) See judgment of Duke, L.J., at p. 824.

It is to be noted that payment into Court cannot be pleaded in answer to a claim in detinue, as the plaintiff has the right to recover the goods in specie if he can get them, and the effect of payment into Court is to deprive him of that right (x).

Exemplary Damages.—In general, exemplary damages are not awarded in actions of detinue or conversion. In the case of *Thurston v. Charles* (y), however, which was a case of detention and conversion of a letter, exemplary damages were awarded, but the judge in his summing up stated that the cause of action was in substance one of trespass. There would appear, however, to be no good reason in principle, why exemplary damages should not be awarded in cases where the wrongful detention is vindictive, insolent or malicious, or a deliberate infringement of the plaintiff's rights.

Trover.—The measure of damages in an action of trover is, in general, the value of the goods converted (z).

The date of the conversion was stated by Lord Ellenborough in *Mercer v. Jones* (a), to be the relevant date at which to assess the value, but subsequently in *Greening v. Wilkinson* (b), Abbott, C.J., instructed the jury that they were not restricted to this date, but might assess at any date after the conversion and it is apparently not definitely settled which of these two opinions is the better, but the general trend of opinion would appear to be that the former is the correct view (c). *Henderson v. Williams* (c) was an action of trover for sugar, and it was there held that the measure of damages was the

(x) *Allan v. Dunn* (1857), 1 H. & N. 572; 43 Digest 517, 551.

(y) (1905), 21 T.L.R. 659; 43 Digest 525, 620.

(z) *Finch v. Blount* (1836), 7 C. & P. 478; 43 Digest 519, 574; *Mulliner v. Florence* (1878), 3 Q.B.D. 484; 43 Digest 478, 162; *Johnson v. Lancs, etc., Railway Co.* (1878), 3 C.P.D. 499; 39 Digest 681, 2674.

(a) (1813), 3 Camp. 477; 43 Digest 525, 627.

(b) (1825), 1 C. & P. 625; 43 Digest 521, 587.

(c) See Mayne on Damages *passim*; *Reid v. Fairbanks* (1853), 13 C.B. 692, at p. 728; 43 Digest 509, 484; *Mulliner v. Florence*, *supra*; *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521; 43 Digest 521, 594.

market price of the sugar at the date of the conversion ; and see the view of Lord Herschell in *Rhodes v. Moules* (*d*), to much the same effect. The price at which the goods were sold by the person wrongfully converting them is, however, not by any means necessarily the true value of them, or the value at which they must be assessed in an action of trover. Quite apart from the fact that a dishonest person will often accept a low price for a quick return and no questions asked, the sale may be a forced one as in *Ewbank v. Nutting* (*e*), or at a place where there is no market for them, as in *Burmah Trading Corporation v. Mirza Mahomed* (*f*).

The value to be assessed is the real (*g*) value to the plaintiff (*h*).

Where a defendant in trover who has been proved to have received the goods, will not produce them, they will be presumed against him to be of the highest value (*i*).

Special damages may be recovered, if claimed, as well as the value of the goods (*j*), *e.g.*, the cost of hire of similar goods (*k*).

As to exemplary damages, the same remarks apply as in the case of detainee (*l*).

The Civil Procedure Act, 1833 (*m*), which allows interest to be awarded in actions of trover, provides that it is to be given "over and above the value of the goods at the time of the conversion."

Once a conversion has occurred an action will lie,

(*d*) [1895] 1 Ch. 236, at p. 254 ; 42 Digest 373, 4227.

(*e*) (1849), 7 C.B. 797, 809, 811 ; 43 Digest 520, 582. And see *Acatos v. Burns* (1878), 3 Ex. D. 282 ; 41 Digest 453, 2841 ; *Glasspoole v. Young* (1829), 9 B. & C. 696 ; 21 Digest 494, 710.

(*f*) (1878), L.R. 5 I.A. 130.

(*g*) *Mulliner v. Florence*, *supra*.

(*h*) *Ewbank v. Nutting*, *supra* ; *Glasspoole v. Young*, *supra*.

(*i*) *Armory v. Delamirie* (1722), 1 Stra. 505 ; 43 Digest 520, 579 ; *Mortimer v. Cradock* (1843), 12 L.J. C.P. 166 ; 43 Digest 520, 580.

(*j*) *Bodley v. Reynolds* (1846), 8 Q.B. 779 ; 43 Digest 522, 601 ; *Davis v. Oswell* (1837), 7 C. & P. 804 ; 43 Digest 521, 590.

(*k*) *Davis v. Oswell*, *supra*.

(*l*) *Ante*, p. 251.

(*m*) S. 29 ; 13 Halsbury's Statutes 113.

though it may be merely for nominal damages (*n*). This is sometimes expressed by the phrase "Conversion cannot be purged." If the goods are returned or offered to be returned after action brought, unless the plaintiff can prove that he has suffered special damage, he will, as a rule, be entitled to no more than nominal damages (*o*), and the Court may stay proceedings on the payment of such nominal damages and costs (*p*).

To the general rule that in trover the measure of damages is the value of the goods, there is an exception if the defendant himself has an interest in the goods, in which case the plaintiff's damage is limited to the value of his own interest in them (*q*). The cases laying down this rule were all cases of the sale or repledge of a pledge by the pledgee, but the principle has been extended to hire-purchase agreements in a certain form by the cases of *Whiteley v. Hilt* (*r*) and *Belsize v. Cox* (*s*).

This may become a matter of great importance in hire-purchase agreements. Unless the agreement specifically provides against the assignability of the hirer's interest in the hired goods and the hire-purchase agreement, the hirer may transfer his interest to a third party as in the case of *Whiteley v. Hilt* (*r*), and even a breach of the hiring agreement by sale or pledge may not be deemed to be so radical as to constitute a complete termination of the bailment, and the purchaser from the hirer may be entitled to say that he has such an interest or special

(*n*) *Hiort v. L.N.W.R.* (1879), 4 Ex. D. 188; 3 Digest 78, 168; *Robinson v. Walker* (1824), 2 L.J.O.S. K.B. 144; 43 Digest 524, 614.

(*o*) *Hiort v. L.N.W.R.*, *supra*; *Moon v. Raphael* (1835), 2 Bing. N.C. 310; 43 Digest 522, 597.

(*p*) *Hiort v. L.N.W.R.*, *supra*; *Gibson v. Humphrey* (1833), 1 Cr. & M. 544; 43 Digest 527, 638; *Tucker v. Wright* (1826), 3 Bing. 601; 43 Digest 527, 639.

(*q*) *Brierly v. Kendall* (1852), 17 Q.B. 937; 7 Digest 133, 756; *Chinery v. Viall* (1860), 6 H. & N. 288; 39 Digest 680, 2672; *Johnson v. Stear* (1863), 15 C.B. N.S. 330; 43 Digest 510, 490; *Halliday v. Holgate* (1868), L.R. 3 Ex. 299, 301; 37 Digest 3, 4.

(*r*) [1918] 2 K.B. 808; 3 Digest 97, 262.

(*s*) [1914] 1 K.B. 244; 3 Digest 98, 267.

property in the hired goods as will reduce the damages which the plaintiff can recover merely to the amount of the outstanding instalments. It will depend in every case on the form of the agreement.

Belsize v. Cox.—In *Belsize v. Cox* (s) a motor taxi-cab was let under a hire-purchase agreement which was held not to be an agreement for the sale thereof. There was a provision that if the hirers sold or parted with the possession of the motor-cab without the consent of the owners, the latter were entitled to take possession of the cab and terminate the agreement. The hirers wrongfully pledged the cab. The learned judge held that on the true construction of the agreement, this pledge did not *ipso facto* determine the bailment, but that it gave the plaintiffs an option to take possession of the cab and determine the agreement, and that until the option was exercised, the agreement continued in force, and that, therefore, the hirer still had an interest in the goods which he could and did assign to his transferee, and that accordingly the pledgee had an interest in the goods, which limited the plaintiff's damages in an action of trover to the plaintiff's own interest in them, *viz.*, the unpaid instalments (t). A similar decision was arrived at in *Whiteley v. Hilt*. The facts in this case and the salient features of the agreement will be found in Chapter 3 (*ante*), p. 121 *et seq.*

On the facts of those cases it was held that the acts of the hirers were not so inconsistent with the contracts, as to amount to a renunciation of them, although had they been simple bailments, apparently, the sale in the one case and the pledge in the other would have had that effect. The hirers, therefore, although committing tortious acts, were not committing acts so entirely inconsistent with the contracts as to amount to their repudiation, which on accept-

(t) But see p. 123, *ante*, for a criticism of this decision. *Vide* also *Johnson v. Stear*, *supra*; *Donald v. Suckling* (1866), L.R. 1 Q.B. 585; 37 Digest 9, 43.

ance would entitle the owners to immediate possession. It must be borne in mind that in neither of these cases was there any express obligation on the part of the hirer not to assign or deal with the agreement or the option to purchase, as there is in most modern agreements, nor was the grant of the option made conditional upon the due performance by the hirer of all the obligations of the agreement. Further, in *Whiteley v. Hilt*, the fact that the hirer had the power to redeem the piano even after it had been taken possession of by the owners for breach of the agreement, by paying the arrears and finding a guarantor to the satisfaction of the owners, made it difficult for the owner to argue, that at the time of the action, the hirer had not an interest in the goods.

It is submitted that, in a properly drawn hire-purchase agreement, the hirer would have no interest in the agreement after such breach of it as would entitle the owner to sue, and in any event, if a clause be inserted similar to that in the agreement in *Smart Bros., Ltd. v. Holt* (u), enabling the owner to put an end to the agreement altogether, then, after such a complete termination, the hirer could have no interest whatever in the agreement, goods or option, as any rights he at any time might have had, would have been derived from the agreement which ex-hypothesi is at an end, and the parties would be remitted to their Common Law rights.

(D) VARIOUS

Statute of Limitations.—By section 3 of the Statute of Limitations, 1623 (v), an action of trover is barred after six years from the date of the conversion, even though the plaintiff was ignorant of the conversion (w).

(u) [1929] 2 K.B. 303; Digest Supp.

(v) 10 Halsbury's Statutes 429.

(w) *Granger v. George* (1826), 5 B. & C. 149; 32 Digest 344, 264. But see *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718, C.A.; 32 Digest 525, 1813; *Gibbs v. Guild* (1882), 9 Q.B.D. 59, C.A.; 32 Digest 526, 1819, as to the effect of fraudulent concealment of the cause of action.

Time runs from the first of a number of conversions by the defendant (*x*).

In the case of detinue, the action is barred six years after the accrual of the cause of action, *i.e.*, after the demand and refusal (*y*).

Payment into Court.—Payment into Court cannot be pleaded in respect of so much of an action of detinue as relates to the claim for the return of the goods or their value (*z*), but it can be pleaded in respect of damages for the detention, and also in an action of trover in respect of damages for conversion (*a*).

Waiver of Tort.—An owner of goods which have been converted by being sold, can waive the tort and sue for money had and received (*b*), but if he adopts that course he cannot subsequently sue on the basis of conversion (*c*). And if the conversion amounts to a larceny, the action may be stayed until after the prosecution of the guilty person (*d*). But the obligation which the law imposes on a person to prosecute the party who has stolen his goods, before suing, does not apply where the action is against a third party innocent of the felony (*e*).

Judgment. Detinue.—In detinue the judgment is for the return of the chattels claimed or their value as assessed, or for the delivery up of the specific chattels without the option, according to circumstances (*f*). If

(*x*) *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; 32 Digest 327, 136

(*y*) *Granger v. George*, *supra*; *Wilkinson v. Verity*, *supra*; *Spackman v. Foster* (1883), 11 Q.B.D. 99; 32 Digest 344, 271; *Miller v. Dell*, [1891] 1 Q.B. 468; 32 Digest 344, 272.

(*z*) *Allan v. Dunn* (1857), 1 H. & N. 572; 43 Digest 517, 551.

(*a*) *Crossfield v. Such* (1853), 8 Ex. 159; 43 Digest 518, 560. Where the claim is in detinue and alternatively trover, see judgments in *Whiteley v. Hill*, [1918] 2 K.B. 808; 3 Digest 97, 262.

(*b*) *Comité des Assureurs Maritimes v. Standard Bank of South Africa* (1883), Cab. & El. 87; 3 Digest 181, 340.

(*c*) *Smith v. Baker* (1873), L.R. 8 C.P. 350; 43 Digest 536, 711.

(*d*) *Smith v. Selwyn*, [1914] 3 K.B. 98; 1 Digest 63, 516; *White v. Spettigue*, 13 M. & W. 603; 43 Digest 518, 567 *Lee v. Bayes & Robinson* (1856), 18 C.B. 599; 1 Digest 65, 538.

(*e*) *White v. Spettigue*, *supra*; *Lee v. Bayes & Robinson*, *supra*; *Osborn v. Gillett* (1873), L.R. 8 Ex. 88; 36 Digest 138, 930.

(*f*) See *ante*, p. 249.

the defendant has the option, satisfaction of the judgment by payment of the assessed value, vests the property in the defendant (g). But judgment for the whole of the arrears of instalments under a hire-purchase agreement, if unsatisfied, does not preclude the owner from recovering possession of the chattel under the agreement (h).

It should be borne in mind that claims for the recovery of a specific chattel with or without a claim for hire thereof, or for damages for detention, can now be specially indorsed on a writ, and summary judgment obtained for the delivery of the chattel (i), and the Court may make an order for the delivery up of the chattel without giving the defendant any option of retaining it on paying its assessed value (j). Presumably there would still have to be an interlocutory judgment for the damages to be assessed.

As for judgments in default of appearance and defence both in detinue and trover, see R. S. C., O. XIII, rr. 5, 6 and 7, and O. XXVII, rr. 4, 5 and 6 respectively.

Judgment. Trover.—Judgment in trover is always for damages *simpliciter*.

Preservation, Inspection, etc., of Chattels.—R. S. C., O. 50, r. 3, provides that any party to a cause or matter may apply for an order for the preservation, detention or inspection of any property or thing which is the subject matter of the action, and the Court may make the order on such terms as may be just, and to that end may authorise any person to enter upon land or building in the possession of any party to the action. The corresponding rule in the County Court is O. XIII, r. 11.

In the unreported case of *Moore v. Austin*, Scrutton, J.,

(g) *Brinsmead v. Harrison* (1871), L.R. 6 C.P. 584; 43 Digest 531,668.

(h) *South Bedfordshire Electrical Finance Co., Ltd. v. Bryant*, [1938] 3 All E.R. 580; cf. *Brooks v. Beirnsstein*, [1909] 1 K.B. 98; 3 Digest 96, 258, where it was held that the right of an owner to recover arrears of hire-rent of goods which had been let under a hire-purchase agreement in ordinary form was not lost by his retaking possession of the goods.

(i) R. S. C., O. 3, r. 6; R. S. C., O. 14, r. 1.

(j) R. S. C., O. 14, r. 1 (c).

in Chambers, appointed the plaintiff himself receiver for safe custody of a piano let on hire-purchase, until the hearing of the claim for the delivery up of the instrument. The application was made *ex parte* and has frequently been followed. (*k*).

SECTION 2—TRESPASS

Some owners of goods let on hire or hire-purchase, prefer to take advantage of the powers, generally given them by the hiring agreement, of entering upon the premises of the hirer to take possession of the goods, upon default of payment of the rent or other breach of the agreement, instead of proceeding by action. Not unnaturally this occasionally results in actions for trespass to land or to goods being brought against them.

1.—Trespass to Land.

"By the Law of England, every invasion of private property be it ever so minute, is a trespass" (*l*). A trespass may be committed in many different ways, such as unlawfully riding, driving or walking on land (*m*), wrongfully distraining (*n*) or levying execution (*o*) or remaining in occupation after the termination of a tenancy (*p*).

In order to maintain an action of trespass, the plaintiff must have had possession, actual or constructive, at the time of the trespass (*q*). The owner of the land, therefore, if not in possession, cannot sue in trespass (*r*), though he may sue for the permanent injury to his reversion (*s*).

(*k*) And see *Steamship New Orleans Co. v. London, etc., Insurance Co.*, [1909] 1 K.B. 943, C.A.; 22 Digest 188, 1592.

(*l*) *Per* Lord Camden, C.J., in *Entick v. Carrington* (1765), 2 Wils. 275; 43 Digest 378, 55.

(*m*) *Blundell v. Catterall* (1821), 5 B. & Ald. 268; 26 Digest 261, 18.

(*n*) *Keen v. Priest* (1859), 4 H. & N. 236; 18 Digest 299, 356.

(*o*) *Semayne's case* (1604), 5 Co. Rep. 91a; 21 Digest 477, 569.

(*p*) *Coffey v. M'Evoy*, [1912] 2 I.R. 290; 36 Digest 50, 307, *x*.

(*q*) *Topham v. Dent* (1830), 6 Bing. 515; 43 Digest 380, 65.

(*r*) *Wallis v. Hands*, [1893] 2 Ch. 75; 43 Digest 392, 155.

(*s*) *Metropolitan Association v. Petch* (1858), 5 C.B. N.S. 504; 19 Digest 186, 1359.

Actual possession is a question of fact and implies an intention to possess, and the right to exclude other persons (*t*). To found an action of trespass there must be the right in the plaintiff to the exclusive possession of the land, or premises (*u*).

Constructive possession may arise when the person legally entitled to land, enters upon it when it is in wrongful occupation by another. This possession then constructively relates back to the time his right arose, and he may maintain trespass against the person previously in possession (*v*).

Any clear and exclusive possession is sufficient to support an action of trespass against a wrongdoer, and the latter cannot set up a *jus tertii* unless he claims under it (*w*), and a mere lodger who has not contracted for any interest in the premises, but merely for board and lodging cannot maintain trespass (*x*).

As to trespass *ab initio*, reference should be made to the *Six Carpenters'* case (*y*) and the cases discussed in *Smith's Leading Cases*. It is a matter of some importance in cases of distress. In short, the position is, that if a person enters upon premises under an authority given by the law, *e.g.*, for the purpose of levying a distress, and there commits an act which is wrongful and a trespass, he becomes a trespasser *ab initio*, and may be sued as though the whole proceedings were wrongful. But this severity has been alleviated by Statute in the case of distress (*z*).

It is a good defence to an action of trespass, that the

(*t*) *Wilson v. Mackreth* (1766), 3 Burr. 1824; 43 Digest 383, 87; *Noye v. Reed* (1827), 1 Man. & Ry. K.B. 63; 43 Digest 383, 88.

(*u*) *Wellaway v. Courtier*, [1918] 1 K.B. 200; 43 Digest 383, 92.

(*v*) *Jones v. Chapman* (1849), 2 Ex. 803, 821; 43 Digest 406, 284.

(*w*) *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405; 43 Digest 382, 81; *Bristow v. Cormican* (1878), 3 App. Cas. 641, H.L.; 43 Digest 382, 80.

(*x*) *Wright v. Stavert* (1860), 2 E. & E. 721; 30 Digest 517, 1722.

(*y*) (1610), 8 Co. Rep. 146a; 43 Digest 393, 165.

(*z*) Distress for Rent Act, 1737, ss. 19 & 20; 5 Halsbury's Statutes 150, 151. And see *ante*, p. 209.

entry has been made by leave and licence of the person lawfully in possession (*a*), and a person so let into possession may remain until the licence is revoked (*b*), which can be done at any time (*c*), unless it is a licence coupled with an interest (*d*). But if the leave and licence is contained in any agreement and is for the purpose of authorising an owner or any person on his behalf to retake possession of goods let under a hire-purchase agreement in relation to which the Hire-Purchase Act, 1938, applies, it is void (*e*).

Damages.—In trespass damages are at large. The plaintiff is entitled to some damages, though no actual damage was done, and if the entry was accompanied by circumstances of aggravation, such as violence, contemptuous or insulting language or wanton injury to property, exemplary damages may be awarded (*f*). Neither an owner nor his agent can escape liability for any entry, if made for the purpose of taking possession of goods let under a hire-purchase agreement in relation to which the Hire-Purchase Act, 1938, applies, by reason of the terms of any provision in any agreement relieving him of liability, as such a provision is void (*g*).

2.—Trespass to Goods.

Unlawful acts may be done in relation to goods, which are not actionable in trover, but yet are actionable as trespasses to goods.

Any wrongful disturbance of or interference with the

(*a*) *Bennett v. Allcott* (1787), 2 Term Rep. 166 ; 43 Digest 409, 321.

(*b*) *Littleton v. M'Namara* (1875), I.R. 9 L.C. 417 ; 43 Digest 411, *q*.

(*c*) *Wood v. Leadbitter* (1845), 13 M. & W. 838 ; 30 Digest 515, 1708. But see *Hurst v. Picture Theatres, Limited*, [1915] 1 K.B. 1, C.A. ; 30 Digest 513, 1682.

(*d*) *Jones (James) & Sons, Ltd. v. Tankerville*, [1909] 2 Ch. 440 ; 39 Digest 679, 2657 ; *Wood v. Manley* (1839), 11 Ad. & El. 34 ; 39 Digest 548, 1577.

(*e*) Hire-Purchase Act, 1938, s. 5 (*a*) ; *post*, p. 283.

(*f*) *Merest v. Harvey* (1814), 5 Taunt. 442 ; 17 Digest 123, 318.

(*g*) Hire-Purchase Act, 1938, s. 5 (*a*) ; *post*, p. 283.

possession of goods, by removing or damaging them, is a trespass (*h*), although it may not be a conversion (*i*).

Lord Kenyon said in *Ward v. Macauley* (*j*): "The distinction between an action of trespass and trover is well settled—the former is founded on possession, the latter on property," and in *Price v. Helyar* (*k*), Best, C.J., said: "In trespass, therefore, a party is liable if he takes the thing only for an instant—in trover not unless he proceeds to a conversion."

The gist of the action of trespass is the wrongful interference with the possession, that of trover the wrongful conversion of the goods to the use of the defendant or a third party. As was said by Baron Alderson in *Fouldes v. Willoughby* (*l*), "Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover." Although most conversions are also trespasses and entitle the plaintiff to sue in either form at his election (*m*), yet a person who, with knowledge, receives from another, goods which the latter has wrongfully seized, and refuses to deliver them up to the true owner on demand, does not thereby commit a trespass on the goods (unless the goods were seized to his use), yet he is liable in trover (*n*).

In trespass, as in trover, it is essential that the plaintiff should have the possession or the right to the immediate possession, of the goods (*o*).

If, therefore, an owner has parted with possession by

(*h*) *Leame v. Bray* (1803), 3 East, 593; 43 Digest 420, 429; *Fouldes v. Willoughby* (1841), 8 M. & W. 540; 43 Digest 420, 443.

(*i*) *Bushel v. Miller* (1718), 1 Stra. 128; 43 Digest 421, 457.

(*j*) (1791), 4 Term Rep. 489; 43 Digest 421, 459. *Re Ashwell, Ex parte Salaman*, [1912] 1 K.B. 390; 5 Digest 636, 5722.

(*k*) (1828), 4 Bing. 597; 43 Digest 421, 460.

(*l*) *supra*.

(*m*) *Parker v. Bailey* (1824), 4 Dow. & Ry. K.B. 215; 43 Digest 422, 465; *Bishop & Jurdain v. Montague* (1604), Cro. Jac. 50; 43 Digest 422, 464.

(*n*) *Wilson v. Barker* (1833), 4 B. & Ad. 614; 43 Digest 422, 475.

(*o*) *Ward v. Macauley, supra*; *Re Ashwell, Ex parte Salaman, supra*.

letting goods on hire, he cannot sue in trespass (*p*), but the bailee can do so, if he has exclusive possession. The measure of damages in trespass to goods is, as a rule, the value of the goods or the amount of damage done to them, but exemplary damage may be given for the manner in which the trespass was committed (*q*). And even where there is no question of malice or ill-feeling in the taking of goods, substantial damages may be awarded in trespass, on account of the manner in which goods are seized, whereas, in trover, under the same circumstances, nominal damages only would be awarded (*r*).

It is no defence to an action of trespass by a person in possession of the goods, to allege that the goods belonged to a third person (*s*). A defendant can only set up *jus tertii* when the plaintiff is merely relying on a right of property (*t*).

As in actions of trespass to land, leave and licence may be pleaded (*u*).

SECTION 3—ACTIONS FOR DAMAGES FOR ILLEGAL OR IRREGULAR OR EXCESSIVE DISTRESS

When the distress is illegal (as to which reference should be made to an earlier part of this book) (*v*), there are several alternative remedies open to the person aggrieved. He may bring an action of replevin, or of detinue or trover, or simply an action for damages for illegal distress, or he may join the last three in the alternative in one action. When the distress is merely irregular or excessive, the remedy is confined to an action for damages.

(*p*) *Ward v. Macauley*, *supra*.

(*q*) *Brewer v. Dew* (1843), 11 M. & W. 625; 5 Digest 972, 7963.

(*r*) *Bayliss v. Fisher* (1830), 7 Bing. 153; 18 Digest 392, 1337.

(*s*) *Ashmore v. Hardy* (1836), 7 C. & P. 501; 43 Digest 425, 503; *Hallet v. Birt* (1697), 1 Ld. Raym. 218; 43 Digest 425, 507.

(*t*) *Gadsden v. Barrow* (1854), 9 Ex. 514; 43 Digest 515, 529.

(*u*) See *ante*, p. 260. *Kavanagh v. Gudge* (1844), 7 Man. & G. 316; 43 Digest 410, 337.

(*v*) *Ante*, p. 196 *et seq.*

Replevin.—This form of proceedings is not very often launched nowadays, as practically identical remedies can usually be secured with less formality, by alternative means, but it is the appropriate remedy and may be of value where it is essential to the owner to recover possession of goods without delay (*w*) and there is a doubt whether an order for their preservation will be made by the Court. It is a judicial redelivery to their owner of goods which he alleges have been wrongfully seized, whether under a distress for rent or otherwise (*x*), upon his giving security to cover the rent or the value of the goods, and the probable costs of the action, and undertaking to prosecute an action against the distrainor without delay to determine the right to distrain (*y*).

Power to grant replevin bonds is now given exclusively to the registrar of the County Court of the district in which the goods are seized (*z*). The action subsequent to the grant of the bond may, however, be brought either in the High Court or the County Court, but if the action is to be brought in the High Court it is made a condition of the bond that the replevisor shall prove that he had a good ground for believing either that the title to some hereditament exceeding £20 in value or some toll market fair or franchise was in question, or that the alleged rent or damage in respect of which the distress was made or the value of the goods seized exceeded £20 (*a*). The joinder of other causes of action with replevin is said to be, at Common Law, irregular and illegal (*b*). Whether this be the case or not, at any rate in the County Court no cause of action may be joined

(*w*) *Gibbs v. Cruikshank* (1873), L.R. 8 C.P. 454, 459; 1 Digest 16, 125.

(*x*) *Mellor v. Leather* (1853), 1 E. & B. 619; 18 Digest 371, 1122; *George v. Chambers* (1843), 11 M. & W. 149; 18 Digest 451, 1873.

(*y*) County Courts Act, 1934, ss. 101-103; 27 Halsbury's Statutes 139, 140.

(*z*) *Ibid.*, s. 101.

(*a*) *Ibid.*, s. 102.

(*b*) *Munegan v. Wheatley* (1851), 6 Ex. 88, *per* Pollock, C.B., and Parke, B., at p. 97; 13 Digest 475, 251.

with an action of replevin except by leave of the Court (c). It is not proposed to deal further with these technical proceedings, but the reader is referred to the County Court practice books and to textbooks on distress.

Action for Damages for Illegal Distress.—This form of action may be joined in the alternative with an action of detinue or trover or trespass.

The tenant or the owner of the goods or a person having the mere use or enjoyment of the goods, may bring the action (d).

It should be brought against the bailiff who committed the illegality and (if the landlord can be shown to have sanctioned or ratified it, but not otherwise), also against the landlord (e).

The landlord is also liable if, after service of a declaration in accordance with the terms of the Law of Distress Amendment Act, 1908, he proceeds with the distress (f).

A landlord's agent authorising a bailiff to distrain, is liable for an illegal distress if he actually gives the order so long as he is not merely, as it were, a conduit pipe transmitting the landlord's order (g).

The measure of damages in an action for illegal distress, is the full value of the goods without any deduction in respect of rent (h), but these damages may be mitigated, e.g., where the plaintiff has subsequently received back

(c) C. C. R., Order IV, r. 2 (b).

(d) *Swire v. Leach* (1865), 18 C.B. N.S. 479; 18 Digest 292, 279; *Kerby v. Harding* (1851), 6 Ex. 234; 18 Digest 339, 732; *Fell v. Whittaker* (1871), L.R. 7 Q.B. 120; 18 Digest 391, 1328; *Fisher v. Algar* (1826), 2 C. & P. 374; 18 Digest 351, 887; *Wilkinson v. Ibbett* (1860), 2 F. & F. 300; 18 Digest 391, 1326.

(e) *Lewis v. Read* (1845), 13 M. & W. 834; 18 Digest 332, 664; *Moore v. Drinkwater* (1858), 1 F. & F. 134; 18 Digest 295, 370; *Carter v. St. Mary Abbots* (1900), 64 J.P. 548, C.A.; 18 Digest 410, 1498; *Freeman v. Rosher* (1849), 13 Q.B. 780; 18 Digest 332, 665; *Becker v. Riebold* (1913), 30 T.L.R. 142; 18 Digest 386, 1260.

(f) Law of Distress Amendment Act, 1908, s. 2; 5 Halsbury's Statutes 161; Appendix E, *post*, p. 355.

(g) *Bennett v. Bayes* (1860), 5 H. & N. 391; 18 Digest 325, 591.

(h) *Attack v. Bramwell* (1863), 3 B. & S. 520; 18 Digest 334, 692; *Keen v. Priest* (1859), 4 H. & N. 236; 18 Digest 299, 356; *Grunnell v. Welch*, [1906] 2 K.B. 555, C.A.; 18 Digest 334, 686.

his goods (*i*), although the plaintiff is entitled to receive substantial damages whenever a landlord has placed a man in possession, even though the plaintiff had the use of the goods all the time (*j*).

In the case of removal of fixtures, which are exempt from distress (*k*), the damages are not necessarily determined by the value of the goods when severed from the freehold and converted into chattels, but may be the value of the fixtures to an incoming tenant (*l*).

If the distress is legal as to part and illegal as to part, *e.g.*, where goods privileged from distress have been seized among others not so privileged, the measure of damages is the value of the goods wrongfully seized only (*m*).

Defence.—A defendant in an action for illegal distress may plead “not guilty by Statute” (*n*) except, against a public authority (*o*), but if he does, he may not plead any other defence.

This defence of the “general issue” is useful, in that it puts in every issue every fact and enables the defendant to raise all matters of law, mitigation or justification (*p*), but is only available where the distress is made on the premises from which the rent accrues, and not where the distress is made off the premises, where the law allows this (*q*), *e.g.*, in cases of fraudulent removal to avoid a

(*i*) *Harvey v. Pocock* (1843), 11 M. & W. 740; 18 Digest 368, 1090.

(*j*) *Bayliss v. Fisher* (1830), 7 Bing. 153; 18 Digest 392, 1337.

(*k*) *Crossley Bros., Ltd. v. Lee*, [1908] 1 K.B. 86; 18 Digest 297, 320. See *ante*, p. 200.

(*l*) *Moore v. Drinkwater*, *supra*.

(*m*) *Harvey v. Pocock*, *supra*.

(*n*) This right was given by the Distress for Rent Act (1737), s. 21; 5 Halsbury's Statutes 151, and is still preserved by the R. S. C. subject to the restriction that the defendant may not plead any other defence with it and must specify the section of the Act on which he relies. R. S. C., O. 19, r. 12; R. S. C., O. 21, r. 19.

(*o*) Public Authorities Protection Act, 1893, s. 2; 13 Halsbury's Statutes 459.

(*p*) *Williams v. Jones* (1841), 11 Ad. & El. 643; 18 Digest 392, 1338; *Eagleton v. Gutteridge* (1843), 11 M. & W. 465; 18 Digest 275, 132; *Jones v. Gooday* (1842), 9 M. & W. 736; 43 Digest 414, 372.

(*q*) *Furneaux v. Fotherby & Clarke* (1815), 4 Camp. 136, N.P.; 18 Digest 392, 1342.

distress. This defence is an anachronism and quite contrary to the spirit of modern pleading, which tends towards effecting a complete and clear exposure of the cases of all parties before the trial.

Double Value.—In cases where goods have been seized and actually sold (*r*) under a distress, when no rent was actually due, the owner and no one else (*s*), is entitled by statute, to recover double the value of the goods taken and sold (*t*), and full costs (*u*).

Irregular Distress, and Excessive Distress.—Reference should be made to the text in Chapter 6 (*v*) as to what amounts to an irregular or excessive distress.

In each case the action may be brought against both the landlord and the bailiff, and the ignorance of the landlord or his repudiation of the wrongful acts of the bailiff, will not assist him as in the case of an illegal distress (*w*).

The same persons may sue as in the case of an illegal distress and the general issue may also be pleaded (*x*).

An action for an irregular distress will not lie without proof of special damage (*y*), and in the absence thereof, the plaintiff will not be entitled even to nominal damages, but judgment will be given for the defendant (*z*).

The measure of damages is the full value of the goods, less the rent and charges, but only where the loss is actually shown to have occurred (*a*).

In an action for an excessive distress, if the plaintiff succeeds, he will in any event be entitled to nominal

(*r*) *Masters v. Farris* (1845), 1 C.B. 715 ; 18 Digest 393, 1347.

(*s*) *Chancellor v. Webster* (1893), 9 T.L.R. 568 ; 18 Digest 322, 560.

(*t*) Distress Act, 1689, s. 4 ; 5 Halsbury's Statutes 142.

(*u*) *i.e.*, party and party costs. *Avery v. Wood*, [1891] 3 Ch. 115 ; 13 Digest 228, 685.

(*v*) p. 209, *ante*.

(*w*) *Haseler v. Lemoyne* (1858), 5 C.B. N.S. 530 ; 18 Digest 331, 645.

(*x*) See *ante*, p. 265.

(*y*) Distress for Rent Act, 1737, s. 19 ; 5 Halsbury's Statutes 150.

(*z*) *Lucas v. Tarleton* (1858), 3 H. & N. 116 ; 18 Digest 389, 1289 ; *Rodgers v. Parker* (1856), 18 C.B. 112 ; 18 Digest 351, 893.

(*a*) *Knotts v. Curtis* (1832), 5 C. & P. 322 ; 18 Digest 389, 1292.

damages, even where the goods were not actually sold, and he can prove no actual damage (*b*).

The ordinary measure of damages is the fair value of the goods sold, less the rent due and charges (*c*), or if they did not all belong to the plaintiff, his proportion of the value (*d*).

SECTION 4—DURESS OF GOODS

If a payment is made under duress, or some form of compulsion other than the compulsion of law, the payment is not deemed to be voluntary and the money can be recovered in an action for money had and received (*e*). As a general rule payments made under protest to recover goods wrongfully seized or detained, are not deemed to be voluntary and may be recovered under this form of action (*f*), *e.g.*, payments made to a railway company (*g*), or carrier (*h*) or pawnbroker (*i*) in order to release goods from wrongful detention. This remedy is frequently useful to owners of goods let under hiring or hire-purchase agreements and wrongfully seized by third parties, as it enables them to recover the goods immediately and the subsequent action is conducted on a much lower scale of costs than if an action in detinue were necessary. It must be borne in mind, however, that this action is not available to recover money paid to redeem goods from the custody of the law (*j*). But if an owner has been

(*b*) *Chandler v. Doulton* (1865), 3 H. & C. 553; 18 Digest 392, 7331.

(*c*) *Wells v. Moody* (1835), 7 C. & P. 59; 18 Digest 370, 1102.

(*d*) *Bail v. Mellor* (1850), 19 L.J. Ex. 279; 18 Digest 391, 1327.

(*e*) *Brown v. M'Kinally* (1795), 1 Esp. 279; 12 Digest 555, 4607.

(*f*) *Astley v. Reynolds* (1731), 2 Stra. 915; 12 Digest 557, 4626; *Pratt v. Vizard* (1833), 5 B. & Ad. 808; 12 Digest 557, 4629; *Wakefield v. Newbon* (1844), 6 Q.B. 276; 12 Digest 557, 4631; *Maskell v. Horner*, [1915] 3 K.B. 106; 12 Digest 558, 4635.

(*g*) *Parker v. Bristol & Exeter Rail. Co.* (1851), 6 Exch. 702; 12 Digest 96, 589.

(*h*) *Ashmole v. Wainwright* (1842), 2 Q.B. 837; 8 Digest 16, 69.

(*i*) *Astley v. Reynolds*, *supra*.

(*j*) *Liverpool Marine Credit Co. v. Hunter* (1868), 3 Ch. App. 479; 12 Digest 96, 590.

compelled to pay money to recover his goods which have been lawfully seized on a distress for rent due to another person's landlord he can recover the money from the person distrained upon (*k*), unless the goods were left on the premises for the owner's convenience (*l*).

SECTION 5—INTERPLEADER

It may be well to mention shortly another form of legal proceeding in which owners of goods let under hiring or hire-purchase agreements are not infrequently involved, *viz.*, interpleader proceedings. This is a civil process whereby a person in possession of property or owing money which is or may be claimed by two or more persons with opposing claims, may obtain relief from liability under all the claims by forcing the rival claimants to bring their claim before a tribunal for determination. This remedy may be obtained both in the High Court and County Court and is largely made use of by sheriffs and County Court registrars (in whom the office of high bailiff is now merged) to relieve themselves of the possibility of duplicate claims in respect of goods seized by them. In the High Court the procedure is governed by R. S. C., Ord. 57, and in the County Court by County Court Rules, Order XXVIII.

The remedy is discretionary, and the applicant must satisfy the Court that he has no personal interest in the matter in dispute other than for charges or costs, that he does not collude with either of the claimants, and that he is willing to dispose of the subject matter as the Court may direct.

(*k*) *Exall v. Partridge* (1799), 8 Term Rep. 308 ; 12 Digest 526, 4385.

(*l*) *Griffinhoofe v. Daubuz* (1855), 5 E. & B. 746, Ex. Ch. ; 12 Digest 527, 4386.

SECTION 6—PROCEEDINGS UNDER THE HIRE-PURCHASE ACT, 1938

By sections 12, 13 and 14 of the new Act a special form of action is laid down for dealing with actions brought by owners to recover possession of goods let under hire-purchase agreements, where one-third of the hire-purchase price has been paid or tendered. The distinctive features of such action may be said to be as follows :—

(a) The action must be commenced in the County Court for the district in which the hirer resides or carries on business or resided or carried on business at the date on which he last made a payment under the hire-purchase agreement (section 12 (1)). This is subject to section 18, by which power is given to confer jurisdiction on inferior Courts by Order in Council. This section overrides Order II of the County Court Rules, 1936.

(b) After the action has been commenced the owner shall not take any step to enforce payment of any sum due under the hire-purchase agreement or under any contract of guarantee relating thereto, except by claiming the sum in the action. A number of difficulties can be foreseen in relation to this provision, *e.g.*, the determining of the sums which can be claimed in the action and the relation of other actions for such sums to the action under the section.

(c) Subject to such exceptions as may be provided for by County Court Rules (*11*), all the parties to the agreement and any guarantor must be made parties to the action. Complications can be envisaged here, since an "owner" by section 21 (1) includes a person to whom the owner's property in the goods or any of the owner's rights or liabilities under the agreement has passed by

(*11*) No exceptions are provided for in the only rules published at the time of going to print, viz. S.R. & O. 1938 No. ^{1A75}_{L24} ; Appendix B, *post*.

assignment or operation of law. It might well include persons who have ceased to have any interest in the agreement.

(d) The Court is given very wide powers of dealing with the goods and may even pass the property in part of the goods to the hirer (section 12 (4) (c)), subject to this, that the Court must be satisfied that the amount that the hirer has paid in respect of the hire-purchase price exceeds the price of the part of the goods whose property is transferred to the hirer by at least one-third of the unpaid balance of the hire-purchase price (section 12 (6)). This proviso is to ensure that the hirer shall not have the benefit of the user of the part of the goods not transferred, possibly for years, for no consideration at all.

(e) Damages awarded against the owner in the proceedings may be treated as a part payment of the hire-purchase price (section 12 (7)).

(f) The hire-purchase price may be apportioned between the various chattels in the hire-purchase agreement for various purposes (section 12 (6), (7), (8) and (9)).

(g) If an owner has recovered part of the goods in contravention of section 11 "the provisions," *i.e.* of section 12 "shall not apply in relation to any action by the owner to recover the remainder of the goods" (section 12 (10)). Presumably this means that the owner must proceed by an ordinary action in detinue. Under the circumstances the owner would be liable to the penalties laid down by section 11 (2), and it is assumed that it is not intended that he should also suffer the loss of the remainder of his goods.

(h) Once an order under section 12, postponing the operation of an order for the specific delivery of goods, has been made, the hirer is to be deemed to be a bailee of the goods under the terms of the hire-purchase agreement, subject to this, that the terms of the agreement and any guarantee relating to it, may be varied by the

Court, and no further sum shall become due under the agreement except in accordance with the order of the Court (section 13).

There are also given wide powers to vary any such order made by the Court (section 13 (4)), and liberty to the owner to apply to the Court if the hirer or a guarantor fails to comply with any condition of such order, or with any term of the agreement (as varied) or wrongfully disposes of the goods.

No useful purpose will be served in further examining the operation of this new form of action until some experience has been obtained in the Courts. The new County Court Rules relating to the Act are meagre in the extreme, the only rule of importance being rule 7A of Order VII, which provides that certain information must be given in the particulars of claim, where a plaintiff claims goods let under a hire-purchase agreement. See Appendix B, *post*, p. 312.

APPENDIX A

HIRE-PURCHASE ACT, 1938 [1 & 2 Geo. 6. Ch. 53]

ARRANGEMENT OF SECTIONS

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SCHEDULE.—Notice to be included in Note or Memorandum of Hire-Purchase Agreement.

An Act to amend the law with respect to the hire-purchase and sale upon credit of goods and the law of distress in its relation thereto.

[29th July 1938.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. Application of Act.—This Act shall apply in relation to all hire-purchase agreements (a) and credit-sale agreements (b) under which the hire-purchase price or total purchase price, as the case may be, does not exceed—

- (a) where the agreement relates to a motor vehicle or railway wagon or other railway rolling stock, the sum of fifty pounds,

- (b) where the agreement relates to livestock, the sum of five hundred pounds, and
- (c) in any other case, the sum of one hundred pounds, and the expressions "hire-purchase agreement" and "credit-sale agreement" shall be construed accordingly.

NOTES TO SECTION 1

This section, which defines the application of the Act, must, by reason of the last two lines of the section, be read in conjunction with section 21 (1), which defines the terms "hire-purchase agreement" and "credit-sale agreement" for the purposes of the Act. The result is that wherever the terms "hire-purchase agreement" or "credit-sale agreement" are used in the Act, the meaning is limited to such agreements as come within the three categories laid down in section 1. This must be so, it is submitted, even in the cases set out in section 20 of the Act in which the Act applies for certain purposes to hire-purchase agreements (credit-sale agreements are not affected) made before the commencement of the Act, *viz.*, before 1st January, 1939 (section 22 (2)). In other words the Act has no relation to hire-purchase agreements or credit-sale agreements, whether made before or after the commencement of the Act, in which the hire-purchase price or total purchase price respectively, exceed the amounts laid down in the three categories. One result may well be that different forms of agreement will be used according as the total purchase price exceeds or falls short of the limits laid down. It is further to be observed that the governing figure is the "hire-purchase price" or "total purchase price" according as the agreement is a hire-purchase agreement or credit-sale agreement. These terms are defined in section 21 (1). Any number of articles may be included in either agreement so long as these figures are not exceeded.

The arbitrary division into categories not exceeding £50, £100 and £500, will be more readily understood when it is appreciated that the genesis of the Act is to be found in the desire of the hire-purchase trade itself and certain philanthropic bodies to protect the very poor against unfair trading methods. Nevertheless it is difficult to avoid the conclusion that the division is illogical and represents a compromise between conflicting interests.

It is to be observed that (with the anomalous exception of

livestock) the operation of the Act is confined to agreements in relation to which proceedings would normally come within the jurisdiction of the County Court, and by section 12 the County Court is, by implication, given extended jurisdiction in actions in which an owner seeks to recover from a hirer possession of goods let under a hire-purchase agreement relating to livestock, although the goods sought to be recovered exceed in value the normal County Court jurisdiction, provided always that the hire-purchase price under the agreement does not exceed £500.

(a) **“Hire-Purchase Agreement.”** This term is in this Act for the first time given a statutory definition (section 21 (1)). This definition by the use of the words “will or may” seems to include not only agreements to hire with an option to purchase (as in *Helby v. Matthews*, [1895] A.C. 471; 3 Digest 93, 245), but also agreements to purchase after the conclusion of the hiring (as in *Lee v. Butler*, [1893] 2 Q.B. 318; 3 Digest 92, 241). Compare Finance Act, 1907, section 7; 16 Halsbury’s Statutes 736, where the words “will or may” are also used. See p. 154 et seq, *ante*.

(b) **“Credit-Sale Agreement.”** This is a new statutory definition for an agreement, of a very restricted kind, for the sale of goods. By section 21 (1) it is defined as “an agreement for the sale of goods under which the purchase price is payable by five or more instalments.” Nothing is said as to the time when the property is to pass or as to the time when possession is to be given to the buyer, but presumably the agreement is different from any which might be included in the definition hire-purchase agreement, in that there is no element of hire, otherwise some agreements in *Lee v. Butler* form would also come within the definition of credit-sale agreements and it is assumed that that is not the intention. It is submitted that the intention of the legislature was that in the case of a credit-sale agreement the property should pass on the making of the agreement, or at any rate on delivery of the goods, but it is questionable in view of the Sale of Goods Act, 1893 (sections 17 and 18), whether that intention has been carried out.

If it had been contemplated that the property might not pass immediately possession was given, it is unlikely that similar provisions to those contained in sections 5 (a), 7 and 11 would not have been included, in relation to credit-sale agreements. It would appear as though there may be in practice some difficulty in deciding in what class a sale on

deferred terms should be placed, and it might prove a very substantial difficulty as the provisions of the Act differ profoundly in relation to the two classes, hire-purchase agreement and credit-sale agreement.

2. Requirements relating to hire-purchase agreements.—(1) Before any hire-purchase agreement is entered into in respect of any goods, the owner shall state in writing to the prospective hirer, otherwise than in the note or memorandum of the agreement, a price at which the goods may be purchased by him for cash (in this section referred to as the "cash price") :

Provided that this subsection shall be deemed to have been sufficiently complied with—

- (a) if the hirer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price, either of the goods as a whole or of all the different articles or sets of articles comprised therein, or
- (b) if the hirer has selected the goods by reference to a catalogue, price list, or advertisement, which clearly stated the cash price either of the goods as a whole or of all the different articles or sets of articles comprised therein.

(2) An owner shall not be entitled to enforce a hire-purchase agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer, and no security given by the hirer in respect of money payable under the hire-purchase agreement or given by a guarantor in respect of money payable under such a contract of guarantee as aforesaid shall be enforceable against the hirer or guarantor by any holder thereof, unless the requirement specified in the foregoing subsection has been complied with, and—

- (a) a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement, and

- (b) the note or memorandum contains a statement of the hire-purchase price and of the cash price of the goods to which the agreement relates and of the amount of each of the instalments by which the hire-purchase price is to be paid and of the date, or the mode of determining the date, upon which each instalment is payable, and contains a list of the goods to which the agreement relates sufficient to identify them, and
- (c) the note or memorandum contains a notice, which is at least as prominent as the rest of the contents of the note or memorandum, in the terms prescribed in the Schedule to this Act, and
- (d) a copy of the note or memorandum is delivered or sent to the hirer within seven days of the making of the agreement :

Provided that, if the court is satisfied in any action that a failure to comply with the requirement specified in the foregoing subsection or any requirement specified in paragraph (b), (c), or (d) of this subsection has not prejudiced the hirer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it thinks fit to impose, dispense with that requirement for the purposes of the action.

NOTES TO SECTION 2

This section will undoubtedly create a great many difficulties for traders, and but for the terms of the proviso would undoubtedly have caused a great deal of real injustice. The insistence upon disclosure to the proposed hirer or purchaser of the "cash price" both before the making of the agreement and again in the agreement itself, is not readily to be understood. The majority of the hirers intended to be assisted are not interested in the cash price, as there is seldom any prospect of their paying it, and it would appear that the disadvantage of the section to the trader is out of all proportion to the advantages to the hirer.

Subsection (1). Great care will have to be taken by traders in dealing with the requirements of this subsection. The provision of a separate writing stating the "cash price" and a written acknowledgment from the hirer is the only safe way, but in cases where the original transaction is negotiated with a dealer, who later sells the goods to a finance company for hiring, great complications may arise.

"Owner." In the Act this word has a special meaning, *i.e.*, "the person who lets or has let goods to a hirer," etc. The statement in writing must be given by "the owner" and the dealer in such a case would not be "the owner" and might not be the owner's agent to make the statement. The statement would have to be given by the finance company. It may be that the draughtsman did not have this special meaning in mind for the purpose of this subsection but rather the colloquial or ordinary meaning, *i.e.*, a person who owns goods, etc. Further, proviso (a) is effective only if the hirer has inspected the goods, and proviso (b) if he has selected the goods with reference to a catalogue, price list or advertisement. These matters may be very difficult of proof.

Subsection (2). The limitations of this extremely penal section are to be noted.

(i) The agreement or guarantee is not rendered void, but unenforceable by the owner. "Owner" includes an assignee of the original owner's rights or liabilities under the agreement or of his rights of property in the goods (section 21 (1)).

It is to be noted that there is no obligation under the Act to put the whole agreement into writing—but the position is that unless certain portions are reduced into writing in the form of a note or memorandum, the agreement is unenforceable. If the whole agreement is in fact in writing, that writing is the best note or memorandum there can be. There is no necessity, it is submitted, to have two writings. (See p. 6, *ante*.)

(ii) The owner cannot enforce "a right" to recover the goods from the hirer, but presumably the owner could recover the goods from a third person who was wrongfully in possession of them, under his common law rights. The words "any right" must, it is assumed, include rights of action as well as rights of seizure.

(iii) Contract of guarantee has a special meaning (section 21 (1)). It only refers to contracts made at the request express or implied of the hirer (or buyer). It is assumed, therefore, that the owner could enforce a guarantee given,

e.g., by a dealer, independently of the hirer. (See p. 18, *ante*.)

(iv) The holder cannot enforce as against the hirer or guarantor any security given by a hirer or guarantor. It is submitted that the owner could sue other parties to the security.

Subsection (2) (a). For the first time it is now provided in effect that hire-purchase agreements, within the categories created by section 1 must, as to certain essential parts, be in writing. In fact, however, they almost invariably have been in writing in the past. It is to be noted that the Court has no power under the proviso to dispense with this requirement, and therefore failure to comply with it may cause the owner to lose his goods without any redress. The distinction between signatures "by the hirer" and "by or on behalf of all other parties to the agreement" is to be observed. It would appear that a signature by an agent "on behalf of" a hirer would not suffice.

Paragraph (b). Except for the insistence on the disclosure of the "cash price" this paragraph merely makes compulsory what is already standard practice.

Paragraph (c). The Schedule will be referred to later.

Paragraph (d). Although it is indubitable that the giving of a copy of the agreement to the hirer is highly desirable, one would have thought that the terms of section 6 were sufficiently severe to secure compliance, without thus providing that failure to comply renders the agreement unenforceable.

3. Requirements relating to credit-sale agreements.—(1) Before making any credit-sale agreement under which the total purchase price exceeds five pounds, the seller shall state in writing to the prospective buyer, otherwise than in the note or memorandum of the agreement, a price at which the goods may be purchased by him for cash (in this section referred to as the "cash price") :

Provided that this subsection shall be deemed to have been sufficiently complied with—

- (a) if the buyer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price, either of the goods

as a whole or of all the different articles or sets of articles comprised therein, or

- (b) if the buyer has selected the goods by reference to a catalogue, price list, or advertisement which clearly stated the cash price either of the goods as a whole or of all the different articles or sets of articles comprised therein.

(2) A person who has sold goods by a credit-sale agreement under which the total purchase price exceeds five pounds shall not be entitled to enforce the agreement or any contract of guarantee relating thereto, and no security given by the buyer in respect of money payable under the credit-sale agreement or given by a guarantor in respect of money payable under such a contract of guarantee as aforesaid shall be enforceable against the buyer or guarantor by any holder thereof, unless the requirement specified in the foregoing subsection has been complied with, and—

- (a) a note or memorandum of the agreement is made and signed by the buyer and by or on behalf of all other parties to the agreement, and
- (b) the note or memorandum contains a statement of the total purchase price and of the cash price of the goods to which the agreement relates and of the amount of each of the instalments by which the total purchase price is to be paid and of the date, or the mode of determining the date, upon which each instalment is payable, and contains a list of the goods to which the agreement relates sufficient to identify them, and
- (c) a copy of the note or memorandum is delivered or sent to the buyer within seven days of the making of the agreement :

Provided that, if the court is satisfied in any action that a failure to comply with the requirement specified in the foregoing subsection or any requirement specified

in paragraph (b) or (c) of this subsection has not prejudiced the buyer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it thinks fit to impose, dispense with that requirement for the purposes of the action.

NOTES TO SECTION 3

This section applies to credit-sale agreements, under which the total purchase price exceeds £5, provisions similar, except as to the Notice, to those applied to hire-purchase agreements by section 2 *mutatis mutandis*. Many of the notes to section 2 therefore also apply to this section.

It is to be observed that there is no obligation under the Act to put into writing a credit-sale agreement where the total purchase price does not exceed £5, and in this respect it differs from a hire-purchase agreement. In fact the only other obligations upon a seller in respect of a credit-sale agreement beyond those set out in this section seem to be those included in section 6, but section 5 (d) and (e) would apply to such an agreement. The Act does not apply retrospectively to credit-sale agreements (section 20 (1) and (3)).

4. Right of hirer to determine hire-purchase agreement.—(1) A hirer shall, at any time before the final payment under a hire-purchase agreement falls due, be entitled to determine the agreement by giving notice of termination in writing to any person entitled or authorised to receive the sums payable under the agreement, and shall, on determining the agreement under this section, be liable, without prejudice to any liability which has accrued before the termination, to pay the amount, if any, by which one-half of the hire-purchase price exceeds the total of the sums paid and the sums due in respect of the hire-purchase price immediately before the termination, or such less amount as may be specified in the agreement.

(2) Where a hire-purchase agreement has been determined under this section, the hirer shall, if he has failed

to take reasonable care of the goods, be liable to pay damages for the failure.

(3) Where a hirer, having determined a hire-purchase agreement under this section, wrongfully retains possession of the goods, then, in any action brought by the owner to recover possession of the goods from the hirer, the court shall, unless it is satisfied that having regard to the circumstances it would not be just and equitable so to do, order the goods to be delivered to the owner, without giving the hirer an option to pay the value of the goods.

(4) Nothing in this section shall prejudice any right of a hirer to determine a hire-purchase agreement otherwise than by virtue of this section.

NOTES TO SECTION 4

If the definition of hire-purchase agreement in section 21 (1) of the Act includes (as it is submitted it does) agreements which in fact amount to agreements to buy within section 9 of the Factors Act, 1889 (p. 325, *post*), *i.e.*, agreements in *Lee v. Butler* form, then it would appear that this section gives the hirer a statutory right to determine such agreement. Apart from such agreements the hirer has hitherto almost invariably been given the right to determine at any time. This section, together with section 5, also controls what was becoming a very undesirable feature of some hire-purchase agreements, under which the hirer found that he had contracted to pay the greater part of the total hire-purchase price of the goods whether he continued the hiring or not, under what is known as the "compensation for depreciation" or "minimum payment" clause. Nevertheless the owner is now given the very substantial benefit that a right to claim up to one-half of the hire-purchase price is blessed by law, and a number of traders who until now have not made use of a "minimum payment" clause are taking advantage of the section. The hirer cannot, however, be made liable for more than one-half (except where there are installation charges) otherwise than in respect of sums becoming due during the currency of the bailment. (See section 5 (b) and (c) and section 19.)

Subsection (2). This liability would in any event in all

probability be expressed in the agreement, but it is an advantage to the trader to have it laid down explicitly in the Act.

Subsection (3). This is a valuable protection for the trader.

Subsection (4). This merely preserves a right which is expressed in every true *Helby v. Matthews* agreement, *i.e.*, in the vast majority of agreements.

5. Avoidance of certain provisions.—Any provision in any agreement —

- (a) whereby an owner or any person acting on his behalf is authorised to enter upon any premises for the purpose of taking possession of goods which have been let under a hire-purchase agreement, or is relieved from liability for any such entry, or
- (b) whereby the right conferred on a hirer by this Act to determine the hire-purchase agreement is excluded or restricted, or whereby any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase agreement by him under this Act, or
- (c) whereby a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Act, or
- (d) whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase or credit-sale agreement is treated as or deemed to be the agent of the hirer or the buyer, or
- (e) whereby an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or

conclusion of a hire-purchase agreement or credit-sale agreement, shall be void.

NOTES TO SECTION 5

This is one of the most important and far-reaching sections in the Act. The words "any provisions in any agreement" are important. It will, it would seem, be impossible to obtain the advantages prohibited by this section, by a collateral or subsequent agreement, apart from the hire-purchase agreement, even though made for fresh consideration.

Paragraph (a). This paragraph should for all practical purposes put an end to the enforced retaking of hired goods let under hire-purchase agreements to which the Act relates, as in the past this right has sprung from the "licence to seize" clause included in the majority of hire-purchase agreements. Now, it will be, at the least, a trespass for the owner to enter the hirer's premises in order to retake goods let under hire-purchase agreements coming within the scope of the Act, unless the hirer consents. The Act, however, does not exclude the possibility of the hirer freely consenting to the removal of the goods without any recourse to legal proceedings. (See the first paragraph of the second part of the Notice in the Schedule to the Act with special reference to the words "without the hirer's consent.") Reference should be made to pp. 75-85, *ante*, on the question of licence to enter.

Paragraph (b). This paragraph excludes the possibility of the parties contracting out of section 4 and of the hirer becoming liable to pay a larger sum under the terms of the agreement, by reason of terminating it, then he is bound to pay by section 4.

Paragraph (c). The object of this paragraph is to provide that where the hire-purchase agreement or the bailment is determined otherwise than under section 4, *e.g.*, by the owner under his powers under the agreement, the hirer shall nevertheless not be subject to any greater liability than if the agreement had been determined by the hirer under that section. The distinction recognised between terminating the agreement and terminating the bailment should be noted.

Paragraph (d). This paragraph is aimed at clauses in the hire-purchase agreements of some finance companies,

whereby the dealer is deemed to be the agent of the hirer. It will be generally agreed that this is a highly salutary subsection but the evil was not very widespread. It will be noticed that the subsection applies also to credit-sale agreements.

Paragraph (e). This paragraph is most important. It is again mainly aimed at the finance companies whose agreements in their own protection frequently provided that they were not to be bound by warranties or collateral agreements made by other persons, *i.e.*, the salesmen or dealers. In the past hirers having entered into agreements on the strength of the most explicit warranties given by the dealer, had found themselves without any remedy against the person with whom they had in fact contracted, *viz.*, the finance company. The question will, of course, frequently arise, as to the extent to which the salesman or dealer is acting "on behalf of" the finance company. Although this subsection was much needed, the finance companies will find themselves faced with heavy additional liabilities in respect of representations which they had no power to control.

6. Duty of owners and sellers to supply documents and information.—(1) At any time before the final payment has been made under a hire-purchase agreement or credit-sale agreement, any person entitled to enforce the agreement (*a*) against the hirer or buyer shall, within four days after he has received a request in writing from the hirer or buyer and the hirer or buyer has tendered to him the sum of one shilling for expenses, supply to the hirer or buyer a copy of any memorandum or note of the agreement (*b*), together with a statement signed by the said person or his agent showing—

- (a) the amount paid by or on behalf of the hirer or buyer,
- (b) the amount which has become due under the agreement but remains unpaid, and the date upon which each unpaid instalment became due, and the amount of each such instalment, and
- (c) the amount which is to become payable under the agreement, and the date or the mode of determining the date upon which each future

instalment is to become payable, and the amount of each such instalment.

(2) In the event of a failure without reasonable cause to comply with the last foregoing subsection, then while the default continues—

- (a) no person (c) shall be entitled to enforce the agreement against the hirer or buyer or to enforce any contract of guarantee relating to the agreement, and, in the case of a hire-purchase agreement, the owner shall not be entitled to enforce any right to recover the goods from the hirer, and
- (b) no security given by the hirer or buyer in respect of money payable under the agreement or given by a guarantor in respect of money payable under such a contract of guarantee as aforesaid shall be enforceable against the hirer or buyer or the guarantor by any holder thereof,

and, if the default continues for a period of one month, the defaulter shall be liable on summary conviction to a fine not exceeding ten pounds.

NOTES TO SECTION 6

This section seems to have been taken in spirit and almost in words from the Moneylenders Acts. Whether the condition of the hire-purchase trade ever rendered such a severe clause necessary is questionable, but the fact remains that it will be law on the 1st January, 1939, as to agreements made on and after that date and it behoves the owner to take the greatest care that he retains his agreements in safe and efficient custody, otherwise loss of the agreement may, in the case of a hire-purchase agreement, entail loss of the goods hired, although the hirer may all the time have a perfect copy of the agreement (sent in accordance with section 2) in his possession. This section applies both to hire-purchase agreements and credit-sale agreements.

(a) “**Any person entitled to enforce the agreement.**” Presumably this means the assignee of the owner, but query does it include the assignee by absolute bill of sale of the property in the goods alone?

(b) **“A copy of any memorandum or note of the agreement.”** This means in every case, except in credit-sale agreements of less than £5, where a written agreement has not been entered into, and no note or memorandum of the parol agreement made.

“Without reasonable cause.” These words temper the severity of the section, but do not suggest what might constitute “reasonable cause.” Presumably, if the agreement had been deposited with a finance company to secure an advance and the information could not be obtained within 4 days or was refused, it would be “reasonable cause.” But not, if owing to a clerk’s negligence, the agreement had been lost or destroyed.

(c) **“No person.”** These words are presumably intended to include the assignee of the owner or seller.

The terms of subsection 2 (a) and (b) follow closely the wording of sections 2 (2) and 3 (2) and reference should be made to the notes on those sections.

7. Duty of hirer to give information as to whereabouts of goods.—(1) Where by virtue of a hire-purchase agreement a hirer is under a duty to keep the goods comprised in the agreement in his possession or control, the hirer shall, on receipt of a request in writing from the owner, inform the owner where the goods are at the time when the information is given or, if it is sent by post, at the time of posting.

(2) If a hirer fails without reasonable cause to give the said information within fourteen days of the receipt of the notice, he shall be liable on summary conviction to a fine not exceeding ten pounds.

NOTES TO SECTION 7

“Where . . . a hirer is under a duty.” The duty arises in the case of every hire-purchase agreement in common form. This is a very valuable benefit conferred on traders by the Act.

8. Conditions and warranties to be implied in hire-purchase agreements.—(1) In every hire-purchase agreement there shall be—

- (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods ;

- (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass ;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass ;
- (d) except where the goods are let as second hand goods (a), and the note or memorandum of the agreement made in pursuance of section two of this Act contains a statement to that effect, an implied condition that the goods shall be of merchantable quality, so, however, that no such condition shall be implied by virtue of this paragraph as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made, or, if the hirer has examined the goods or a sample thereof, as regards defects which the examination ought to have revealed.

(2) Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose.

(3) The warranties and conditions set out in subsection (1) of this section shall be implied notwithstanding any agreement to the contrary, and the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in subsection (2) of this section unless he proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him.

(4) Nothing in this section shall prejudice the operation of any other enactment or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

NOTES TO SECTION 8

Subsection (1) (a). This merely states the law prior to the passing of the Act and is in the same words as in section 12 (2) of the Sale of Goods Act substituting "hirer" for "buyer" (see p. 334, *post*).

Subsection (1) (b). This seems to be an advance on the position established by *Karflex v. Poole*, [1933] 2 K.B. 251; Digest Supp., and *Mercantile Union Guarantee Corpn., Ltd. v. Wheatley*, [1938] 1 K.B. 490; [1937] 4 All E.R. 713. The effect of those two cases appears to be that the implied warranty of title by the owner is fulfilled if, at the time of the bailment, he has acquired the property in the chattel, although at the time of signing the agreement he had no title, or a defective title.

But under a hire-purchase agreement it may be provided that the property is not to pass until the instalments have been paid on their due dates. See p. 63, *ante*, for a discussion of this subject and compare section 12 (1) of the Sale of Goods Act, 1893 (p. 334, *post*).

Subsection (1) (c). This warranty is a modification of section 12 (3) of the Sale of Goods Act, 1893 (p. 334, *post*).

Subsection (1) (d) and subsection (2). These subsections are in accordance with the statements as to the law contained in the case of *Felston Tile Co. v. Winget*, [1936] 3 All E.R. 473. It is immaterial, now, so far as agreements to which the Hire-Purchase Act applies whether those statements were *obiter* or not. See p. 159, *ante*, where this case is examined. These provisions are of the very greatest importance and give the hirer much needed protection. The effect is that substantially the same warranties as are implied in a sale of goods are to be implied on a letting under a hire-purchase agreement to which the Act applies. Decisions upon the Sale of Goods Act, 1893, will no doubt be of value in construing this subsection and the relevant section will be found at p. 335, *post*, for comparison.

(a) "**Second-Hand Goods.**" No definition is provided in the Act. Note that the agreement must state that the goods are second-hand in order to come within the exception. As to the meaning of "merchantable quality," see *Bristol Tramways, etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831, C.A.; 39 Digest 418, 512. It is impossible to contract out of the warranties set out in subsection (1).

Subsection (2). Apparently it would not be sufficient to read the provisions excluding or modifying the condition set out in subsection 2 to the hirer—it must be made clear to him. This would in most cases have the effect of putting an end to the negotiations unless the attempted modification was struck out, and no doubt this was the intention. Nevertheless, in proper cases it will no doubt be successfully accomplished. The hirer should be requested to sign an acknowledgment that the clause excluding subsection 2 has been made clear to him.

9. Appropriation of payments made in respect of hire-purchase agreements.—A hirer who is liable to make payments in respect of two or more hire-purchase agreements to the same owner shall, notwithstanding any agreement to the contrary, be entitled, on making any payment in respect of the agreement which is not sufficient to discharge the total amount then due under all the agreements, to appropriate the sum so paid by him in or towards the satisfaction of the sum due under any one of the agreements, or in or towards the satisfaction of the sums due under any two or more of the agreements in such proportions as he thinks fit, and, if he fails to make any such appropriation as aforesaid, the payment shall by virtue of this section be appropriated towards the satisfaction of the sums due under the respective hire-purchase agreements in the proportions which those sums bear to one another.

NOTES TO SECTION 9

This section is in the opinion of the author unduly harsh to the owner, and will involve the book-keeping departments of big stores in enormous difficulty, and will give the hirer an advantage to which he should not in justice be entitled. For instance, a hirer having paid one-third of the hire-purchase price under one agreement, may, provided the sum is not sufficient to discharge his total indebtedness, allocate every sum he pays to another agreement, which has not reached that stage and as to which there are arrears, knowing full well that the ordinary trader is not likely to bring an action

in respect of the first agreement immediately, in the first place because most traders allow some latitude and in the second because of the difficulties inherent in the action to be brought under section 12. . It is submitted that the ordinary rule as to appropriation of payments is adequate and equitable. In order to avoid book-keeping difficulties, *e.g.*, where the appropriation involves division into fractions of a penny, the owner should endeavour to induce the hirer to make the appropriation himself on making each payment. This will probably prove the lesser evil. This section applies to all hire-purchase agreements whether made before or after the commencement of the Act, so far as it relates to payments made on and after the 1st January, 1939, the date when the Act comes into force. It is impossible to contract out of the section.

10. Evidence of adverse detention in actions by owners to recover possession of the goods.—Where, in an action by an owner of goods which have been let under a hire-purchase agreement to enforce a right to recover possession of the goods from the hirer, the owner proves that, before the commencement of the action and after the right to recover possession of the goods accrued, the owner made a request in writing to the hirer to surrender the goods, the hirer's possession of the goods shall, for the purpose of the owner's claim to recover possession thereof, be deemed to be adverse to the owner.

Nothing in this section shall affect a claim for damages for conversion.

NOTES TO SECTION 10

This section is intended to simplify the proof of demand and refusal in an action of detinue, and undoubtedly confers a valuable benefit in the owner's favour. This section applies to all hire-purchase agreements whether made before or after the commencement of the Act, so far as it relates to actions commenced on and after 1st January, 1939 (section 20 (1) (c)).

11. Restriction of owner's right to recover possession of goods otherwise than by action.—
(1) Where goods have been let under a hire-purchase agreement and one-third of the hire-purchase price has

been paid, whether in pursuance of a judgment or otherwise, or tendered by or on behalf of the hirer or any guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action.

(2) If an owner recovers possession of goods in contravention of the foregoing subsection, the hire-purchase agreement, if not previously determined, shall determine, and—

(a) the hirer shall be released from all liability under the agreement and shall be entitled to recover from the owner in an action for money had and received all sums paid by the hirer under the agreement or under any security given by him in respect thereof, and

(b) any guarantor shall be entitled to recover from the owner in an action for money had and received all sums paid by him under the contract of guarantee or under any security given by him in respect thereof.

(3) The provisions of this section shall not apply in any case in which the hirer has determined the agreement or the bailment by virtue of any right vested in him.

NOTES TO SECTION II

This section is the most radical section in the Act and introduces an important change in the law in relation to hire-purchase agreements coming within its ambit. It extends the provisions of section 5 (a) so as to make it illegal for an owner to seize goods once one-third of the hire-purchase price has been paid or tendered, even though the hirer has permitted him to enter the premises unless the hirer has himself determined the agreement or the bailment (see subsection 3) or the hirer consents to the retaking (see notice in the schedule to the Act). The sanctions provided by subsection 2 (a) and (b) are sufficiently severe to prove an efficient deterrent. The section applies to hire-purchase agreements whether made

before or after the Act, so far as it relates to recovery of goods on and after 1st January, 1939 (section 20 (1) (b)).

Subsection (1). "The owner shall not enforce any right . . . from the hirer." This section does not prevent the owner from recovering the goods from third parties wrongfully in possession of them. "Owner" includes assignee of the owner (section 21 (1)).

"Action." The form of action is confined to that laid down in the next section. There is nothing in this section to prevent the owner taking any other proceedings, *e.g.*, suing for arrears or for damages before such action has been commenced, but once the action to recover possession has been commenced all other claims must be made in that action (section 12 (1)).

Subsection (2). "The hire-purchase agreement . . . shall determine." The owner will, however, be able to recover the remainder of his goods by ordinary action in detainue. The form of action created by section 12 will not apply (section 12 (10)).

12. Powers of court in certain actions by owners to recover possession of the goods.—(1) Where, in any case to which the last foregoing section applies, an owner commences an action to enforce a right to recover possession of goods from a hirer after one-third of the hire-purchase price has been paid or tendered as aforesaid, the action shall be commenced in the county court for the district in which the hirer resides or carries on business or resided or carried on business at the date on which he last made a payment under the hire-purchase agreement, and after the action has been commenced the owner shall not take any step to enforce payment of any sum due under the hire-purchase agreement or under any contract of guarantee relating thereto, except by claiming the sum in the said action.

(2) Subject to such exceptions as may be provided for by county court rules, all the parties to the agreement and any guarantor shall be made parties to the action.

(3) Pending the hearing of the action the court shall, in addition to any other powers, have power, upon the

application of the owner, to make such orders as the court thinks just for the purpose of protecting the goods from damage or depreciation, including orders restricting or prohibiting the user of the goods or giving directions as to their custody.

(4) On the hearing of the action the court may, without prejudice to any other power,—

- (a) make an order for the specific delivery of all the goods to the owner, or
- (b) make an order for the specific delivery of all the goods to the owner and postpone the operation of the order on condition that the hirer or any guarantor pays the unpaid balance of the hire-purchase price at such times and in such amounts as the court, having regard to the means of the hirer and of any guarantor, thinks just, and subject to the fulfilment of such other conditions by the hirer or a guarantor as the court thinks just, or
- (c) make an order for the specific delivery of a part of the goods to the owner and for the transfer to the hirer of the owner's title to the remainder of the goods.

(5) No order shall be made under paragraph (b) of the last foregoing subsection unless the hirer satisfies the court that the goods are in his possession or control at the time when the order is made.

(6) The court shall not make an order transferring to the hirer the owner's title to a part of the goods unless it is satisfied that the amount which the hirer has paid in respect of the hire-purchase price exceeds the price of that part of the goods by at least one-third of the unpaid balance of the hire-purchase price.

(7) Where damages have been awarded against the owner in the proceedings, the court may treat the hirer as having paid in respect of the hire-purchase price, in

addition to the actual amount paid, the amount of the damages, or such part thereof as the court thinks fit, and thereupon the damages shall accordingly be remitted either in whole or in part.

(8) In this section the expression "order for the specific delivery of the goods" means an order for the delivery of the goods to the owner without giving the hirer an option to pay their value, and the expression "price" in relation to any goods means such part of the hire-purchase price as is assigned to those goods by the note or memorandum of the hire-purchase agreement, or, if no such assignment is made, such part of the hire-purchase price as the court may determine.

(9) If at any time before the hearing of an action to which this section applies the owner has recovered possession of a part of the goods, the references in subsection (4) hereof to all the goods shall be construed as references to all the goods which the owner had not recovered, and, if the parties have not agreed upon an adjustment of the hire-purchase price in respect of the goods so recovered, the court may for the purposes of paragraphs (b) and (c) of subsection (4) hereof make such reduction of the hire-purchase price and of the unpaid balance thereof as the court thinks just.

(10) Where an owner has recovered a part of the goods let under a hire-purchase agreement, and the recovery was effected in contravention of the last foregoing section, the provisions of this section shall not apply in relation to any action by the owner to recover the remainder of the goods.

NOTES TO SECTION 12

This section is of a revolutionary character and clothes the Court with a number of additional powers such as vesting the goods or part of them in the hirer (subsection (4) (c)) and treating damages awarded against an owner in the

proceedings as part of the hire-purchase price (subsection (7)). Together with sections 13 and 14 it provides a special code for actions for recovery of possession of goods let under hire-purchase agreements to which the Act relates, in respect of which one-third of the hire-purchase price has been paid or tendered. The section, so far as relates to actions commenced on and after 1st January, 1939 (section 20 (1) (c)) applies to hire-purchase agreements whether made before or after the commencement of the Act.

Subsection (1). This subsection overrides the County Court Rules as to venue and gives, subject to section 18, exclusive jurisdiction to the County Court for these actions.

Subsection (2). New County Court Rules have been issued. They contain no exceptions. See *post*, p. 312.

Subsection (3). This provides a much-needed safeguard in view of the time which may elapse before the action is tried. It extends the powers already possessed by the County Court under O. 13, rr. 10 and 11.

Subsection (4) (b). This merely embodies in the Act a practice which has been very general in many Courts and was originally introduced at the instance of the much abused hire-purchase trader. It is to be noted that this power must be exercised as regards "all the goods" or not at all. But "all the goods" may mean "all the goods which the owner has not recovered" (subsection (9)). Once a postponement order under subsection (4) (b) has been made, however, the Court can by subsequent order under section 34 (c) order the specific delivery of a part of the goods to the owner and the transfer of the balance to the hirer. The power granted to the Court by this subsection is limited by subsection (6).

Subsection (4) (c). This is entirely new law and practice. It is to be observed that the Court has no power to order the delivery of all the goods to the hirer under this subsection, but under the ordinary jurisdiction of the Court it could dismiss the action if the whole of the hire-purchase price had been paid, which would have the same effect. By subsection (6), however, so long as part of the hire-purchase price is unpaid the Court's power is limited, so that the owner shall not be deprived of proper remuneration in respect of goods not paid for. There is no difficulty in working out the proportion under subsection (6) but there may be very considerable difficulty in apportioning the hire-purchase price between a number of articles, unless it is expressly

set out in the agreement. Power to apportion is given by subsection (8).

“At least one-third of the unpaid balance.” This gives the Court power to increase the proportion in proper cases, *e.g.*, where the hirer has put the owner to expense or has damaged the goods.

The Court has no power to postpone delivery to the owner of the goods not transferred to the hirer under subsection (4) (b) as the powers in subsection (4) (b) must be exercised in relation to “all the goods.”

Subsection (5). The onus is on the hirer. The provision is no doubt aimed at the cases where the hirer has illegally disposed of the goods.

Subsection (6). This is equitable, since if the Court were permitted to transfer to the hirer such part of the goods as equalled in price the amount of the hire-purchase price paid, then the hirer in effect would have had the user of the balance of the goods for nothing.

Subsection (7). The damages particularly contemplated are presumably those arising by reason of a breach of warranties implied by section 8 (1) (d) or section 8 (2) or other similar warranties, but there is nothing in the subsection so to limit them. New County Court Rules have been issued (they will be found in Appendix B) but they do not greatly assist in solving the problems which will arise under the new Act.

Subsection (8). An enormous increase in the work of County Court Registrars can be envisaged, as it is inconceivable that the time of the County Court judge should be taken up with such details.

Subsection (9). “If the owner has recovered possession of a part of the goods,” *i.e.*, legally, since by the next subsection, section 12 does not apply in relation to any action by the owner to recover the balance of goods where part has been recovered in contravention of section 4.

Subsection (10). “Any action.” The action would be an ordinary action of detinue.

13. Effect of postponement of operation of an order for specific delivery of goods to the owner.—

(1) While the operation of an order for the specific delivery of goods to the owner is postponed under the last foregoing section, the hirer shall be deemed to be a

bailee of the goods under and on the terms of the hire-purchase agreement :

Provided that—

- (a) no further sum shall be or become payable by the hirer or a guarantor on account of the unpaid balance of the hire-purchase price, except in accordance with the terms of the order, and
- (b) the court may make such further modification of the terms of the hire-purchase agreement and of any contract of guarantee relating thereto as the court considers necessary having regard to the variation of the terms of payment.

(2) If while the operation of an order for the specific delivery of the goods to the owner is so postponed the hirer or a guarantor fails to comply with any condition of the postponement, or with any term of the agreement as varied by the court, or wrongfully disposes of the goods, the owner shall not take any civil proceedings against the hirer or guarantor otherwise than by making an application to the court by which the order was made :

Provided that, in the case of a breach of any condition relating to the payment of the unpaid balance of the hire-purchase price, it shall not be necessary for the owner to apply to the court for leave to execute the order unless the court has so directed.

(3) When the unpaid balance of the hire-purchase price has been paid in accordance with the terms of the order, the owner's title to the goods shall vest in the hirer.

(4) The court may at any time during the postponement of the operation of such an order as aforesaid—

- (a) vary the conditions of the postponement, and make such further modification of the hire-purchase agreement and of any contract of guarantee relating thereto as the court considers necessary having regard to the variation of the conditions of the postponement ;

- (b) revoke the postponement ;
- (c) make an order, in accordance with the provisions of the last foregoing section, for the specific delivery of a part of the goods to the owner and for the transfer to the hirer of the owner's title to the remainder of the goods.

NOTES TO SECTION 13

By this section a leaf has been taken out of the Rent Restriction Acts code, the principle being that the hire-purchase agreement continues subject to the control—of the most comprehensive kind—of the Court. The hirer might be described as a “statutory” hirer.

The owner obtains by section 16 (1) the very substantial advantage that during the continuance of the postponement order, the goods are not to be treated as goods in the reputed ownership of the hirer for the purposes of section 4 of the Law of Distress Amendment Act, 1908 (p. 356, *post*) or of the Bankruptcy Act, 1914, section 38; 1 Halsbury's Statutes 643. At the commencement of the action the goods would by section 16 (2) have ceased to be distrainable, as being “comprised in a hire-purchase agreement made by the tenant.” This section applies to hire-purchase agreements within the ambit of the Act, whether made before or after the commencement of the Act, so far as it relates to actions commenced on and after the 1st January, 1939.

14. Powers of the court to deal with payments arising on determination of hire-purchase agreements.—(1) Where a hire-purchase agreement validly provides for the payment by the hirer on or after the determination of the agreement or the bailment of such sum as, when added to the sums paid and the sums due in respect of the hire-purchase price before the determination, is equal to a fixed amount, and a claim is made in respect of any such sum in an action to which section twelve of this Act applies, then—

- (a) if the court makes an order for the specific delivery of a part of the goods to the owner and the

transfer to the hirer of the owner's title to the remainder of the goods, the claim shall be disallowed,

- (b) if the court postpones the operation of an order for the specific delivery of the goods to the owner, it shall not entertain the claim unless and until the postponement is revoked, and shall then deal with the claim as if the agreement had just been determined.

(2) Where the hirer or a guarantor has paid or has been ordered to pay any such sum as aforesaid, and the owner subsequently seeks to recover the goods in an action to which section twelve of this Act applies, the court may treat the said sum as a sum paid or payable, as the case may be, in respect of the hire-purchase price.

NOTES TO SECTION 14

The intention is that the owner shall not get more than the maximum permissible sum as "compensation for depreciation" or "minimum payment."

This section applies to hire-purchase agreements whether made before or after the commencement of the Act, so far as it relates to actions commenced on and after the 1st January, 1939.

Subsection (1). "Validly." Presumably this means within the limits allowed by section 4 (1) and section 5 (b) and (c). Any provision in an agreement purporting to give the owner more than is permitted by section 4 (1) as explained by section 19 (1) is void.

Subsection (1) (a). The reason for this is that the owner will have been adequately compensated by receiving back a larger proportion of the goods than is attributable to the unpaid balance of the hire-purchase price by at least the equivalent of one-third of the unpaid balance (section 12 (b)).

Paragraph (b). This is, of course, reasonable, as the object of the postponement is to enable the hirer to pay the hire-purchase price and so become the owner of the goods. If he does not do so, it is reasonable that the owner should get the benefit of the clause provided that payments made during the postponement are taken into account.

Subsection (2). This subsection is intended to provide for cases in which the owner has brought an action (as he may) on the agreement without seeking to recover the goods. This would not be an action under section 12. Any sum recovered or recoverable by such earlier action must be taken into account.

15. Successive hire-purchase agreements between the same parties.—Where goods have been let under a hire-purchase agreement and at any time after one-third of the hire-purchase price has been paid or tendered the owner makes a further hire-purchase agreement with the hirer comprising those goods, the provisions of sections eleven and twelve of this Act shall have effect in relation to that further agreement as from the commencement thereof.

NOTES TO SECTION 15

The intention appears to be that if any goods have been let under a hire-purchase agreement as to which one-third of the hire-purchase price has been paid, the inclusion of *any* of those goods in a subsequent hire-purchase agreement between the parties, will have the effect of depriving the owner of the right to recover "otherwise than by action" from the beginning of the subsequent agreement. This does not seem fair, but is a more reasonable interpretation than the alternative which involves interpreting the words "comprising those goods" as meaning "comprising *all* those goods." The latter interpretation would enable the owner to evade the section in very many cases. This section will cause enormous difficulties, as it is a very common custom among hire-traders when a customer wishes to be supplied with further goods, to prepare a comprehensive agreement including the first goods, and to treat the sums already paid as a deposit on the new agreement. It will also cause great trouble to salesmen when preparing the agreement as in the case of a "further" agreement the Notice in the Schedule to the Act which must be included in the note or memorandum of the agreement, requires alteration. No explanation is given in the Notice as to the meaning of "further" agreement and

it will be advisable for owners to print an explanation on their forms of agreement.

This section applies to hire-purchase agreements whether made before or after the commencement of the Act, so far as it relates to actions brought on and after 1st January, 1939.

16. Provisions as to bankruptcy of hirer and distress on hirer's premises.—(1) Where, under the powers conferred by this Act, the court has postponed the operation of an order for the specific delivery of goods to any person, the goods shall not, during the postponement, be treated as goods which are by the consent or permission of that person in the possession, order, or disposition of the hirer for the purposes of section four of the Law of Distress Amendment Act, 1908, or of section thirty-eight of the Bankruptcy Act, 1914.

(2) After the determination of a hire-purchase agreement, or after an owner, having a right to recover from a hirer goods which have been let under a hire-purchase agreement, has commenced an action to enforce that right, the goods which have been let under the agreement, or the goods claimed in the action, as the case may be, shall not (notwithstanding that the court in any such action postpones the operation of an order for the specific delivery of the goods to the owner) be treated as goods comprised in the hire-purchase agreement for the purposes of section four of the Law of Distress Amendment Act, 1908.

NOTES TO SECTION 16

This section has already been commented upon when dealing with section 12 (4) (b). For an appreciation of the difficulties to which this section gives some relief reference should be made to the chapter dealing with Distress (p. 178, *ante*).

17. Hirer's refusal to surrender goods not to be conversion in certain cases.—If, whilst by virtue of

this Act the enforcement by an owner of a right to recover possession of goods from a hirer is subject to any restriction, the hirer refuses to give up possession of the goods to the owner, the hirer shall not, by reason only of the refusal, be liable to the owner for conversion of the goods.

NOTES TO SECTION 17

This section has certain retrospective operation, and applies to hire-purchase agreements within the ambit of the Act whether made before or after the commencement of the Act, so far as relates to a "refusal" on and after 1st January, 1939 (section 20 (1) (d)). In view of the terms of section 11 this section hardly seems necessary.

18. Provision for the exercise by inferior courts other than county courts of the jurisdiction conferred by this Act.—(1) His Majesty may by Order in Council direct that the jurisdiction conferred upon county courts by this Act may be exercised by any inferior court specified in the Order, and whilst any such Order is in force with respect to any inferior court, an action to which section twelve of this Act applies may, where the hirer resides or carries on business within the jurisdiction of that inferior court or resided or carried on business within the jurisdiction of that court at the date on which he last made a payment under the hire-purchase agreement, be commenced either in a county court in accordance with the provisions of the said section or in that inferior court.

(2) The Order may contain such provisions as appear to His Majesty to be expedient with respect to the rules of court for regulating the procedure to be followed in any such action, and may also, where it appears to His Majesty to be necessary, contain provisions authorising the making of such rules.

(3) Any Order made under this section may be revoked

or varied by a subsequent Order in Council made in like manner.

NOTES TO SECTION 18

By the Hire-Purchase (Inferior Courts) Order, 1938 (S. R. and O. 1938 No. 1568/L.25) the jurisdiction conferred by the Act on the County Courts may be exercised by the Court of Passage of the City of Liverpool and by the Salford Hundred Court of Record. The rule-making authorities of these Courts are empowered to adopt and apply the County Court Rules.

19. Special provisions as to installation charges.

—(1) Where under any hire-purchase agreement made after the commencement of this Act the owner is required to carry out any installations, and the note or memorandum of the agreement specifies as part of the hire-purchase price the amount to be paid in respect of the installation, the references in section four of this Act to one-half of the hire-purchase price and in sections eleven, twelve and fifteen of this Act to one-third of the hire-purchase price shall be construed as references to the aggregate of the said amount and either one-half of the remainder of the hire-purchase price or one-third of the remainder of the hire-purchase price as the case may be.

(2) For the purpose of this section the expression "installation" means—

- (a) the installing of any electric line as defined by the Electric Lighting Act, 1882, or any gas or water pipe,
- (b) the fixing of goods to which the agreement relates to the premises where they are to be used, and the alteration of premises to enable any such goods to be used thereon, and
- (c) where it is reasonably necessary that any such goods should be constructed or erected on the premises where they are to be used, any work carried out for the purpose of such construction or erection.

NOTES TO SECTION 19

The effect of this section is that if the liability of the owner to carry out the installation and the sum included in the hire-purchase price as the price of the installation are stated in the agreement, the owner gets the benefit of the price of the installation when computing one-third and one-half of the hire-purchase price respectively. By giving the notice specified in section 20 (2) the owner may obtain the advantage of this section in the computation of one-third of the hire-purchase price in relation to hire-purchase agreements made before the commencement of the Act, in so far as they are affected by the operations of sections 11, 12 and 15 of the Act, to the extent therein mentioned.

20. Application of Act in relation to existing agreements.—(1) The following sections of this Act shall, to the extent hereinafter specified, apply in relation to all hire-purchase agreements whether made before or after the commencement of this Act, that is to say :—

- (a) section nine of this Act, so far as it relates to payments made after the commencement of this Act,
- (b) sections eleven and fifteen of this Act, so far as they relate to the recovery of possession of goods after the commencement of this Act,
- (c) sections ten, twelve, thirteen, fourteen and fifteen of this Act, so far as they relate to actions commenced after the commencement of this Act.
- (d) subsection (1) of section sixteen of this Act, so far as it relates to orders made after the commencement of this Act, and subsection (2) of the said section so far as it relates to agreements determined or actions commenced, as the case may be, after the commencement of this Act, and
- (e) section seventeen of this Act, so far as it relates to a refusal to give up possession of goods after the commencement of this Act.

(2) Where goods have been let under a hire-purchase agreement made before the commencement of this Act, and the owner has, as part of the consideration for the hire-purchase price, carried out in relation to those goods any installation within the meaning of the last foregoing section, then, if the owner has served upon the hirer a notice specifying a sum not exceeding the expense actually incurred by the owner in respect of the installation, sections eleven, twelve and fifteen of this Act, so far as by virtue of the last foregoing subsection they apply in relation to that agreement, shall, as respects the recovery of possession of goods after the expiration of twenty-eight days from the service of the notice, and as respects actions commenced after the expiration of the said period, have effect as if for the references in the said sections to one-third of the hire-purchase price there were substituted references to the aggregate of the said sum and one-third of the amount which remains after deducting that sum from the hire-purchase price.

(3) Save as aforesaid this Act shall not apply in relation to any hire-purchase agreement or credit-sale agreement made before the commencement of this Act.

NOTES TO SECTION 20

“All hire-purchase agreements,” i.e., within the categories laid down in section 1. It is not necessary to deal in detail with this section as the various sections which have effect within limitations to hire-purchase agreements made before the commencement of the Act have been dealt with *passim*. Subsection (2), however, must be referred to. There is no explanation given as to the purpose of the delay of 28 days before the benefit of the section becomes operative, but presumably it is to enable the hirer to pay the sum if he sees fit.

The following is an example of the operation of the subsection. Hire-purchase price £100. Sum actually expended on installations £10. One-third of the hire-purchase price = £33 6s. 8d. The sum to be substituted under this subsection is £10 plus one-third of (£100 - £10) = £10 plus £30 = £40.

Assuming that on the 1st January, 1939, the hirer had paid £35 and the monthly instalment was £2. At the expiration of 28 days after the notice the hirer in the normal course would only have paid £37, and the owner would therefore be in a position to retake possession if the hirer then defaulted, or he could bring an ordinary action of detinue. Alternatively assuming the hirer did not default, if the goods comprised in the agreement were included in a further agreement before the hirer had paid £40, sections 11 and 12 would not immediately affect the second agreement under section 15.

21. Interpretation.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, that is to say:—

“ Action,” “ buyer,” “ delivery,” “ goods,” “ property,” “ sale,” “ seller,” “ warranty ” have the meanings respectively assigned to them by the Sale of Goods Act, 1893 ;

“ Hire-purchase agreement ” means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made ;

“ Credit-sale agreement ” means an agreement for the sale of goods under which the purchase price is payable by five or more instalments ;

“ Hire-purchase price ” means the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement ;

“ Owner ” means the person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner’s property in the goods or any of the owner’s rights or liabilities under the agreement has passed by assignment or by operation of law ;

“ Hirer ” means the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer’s rights or liabilities under the agreement have passed by assignment or by operation of law ;

“ Contract of guarantee ” means, in relation to any hire-purchase agreement or credit-sale agreement, a contract, made at the request express or implied of the hirer or buyer, to guarantee the performance of the hirer’s or buyer’s obligations under the hire-purchase agreement or credit-sale agreement, and the expression “ guarantor ” shall be construed accordingly ;

“ Total purchase price ” means the total sum payable by the buyer under a credit-sale agreement, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement ;

“ Motor vehicle ” has the same meaning as in the Road Traffic Act, 1930 ;

“ Livestock ” means horses, cattle, sheep, goats, pigs, or poultry.

(2) Where an owner has agreed that any part of the hire-purchase price may be discharged otherwise than by the payment of money, any such discharge shall, for the purposes of sections four, six, eleven, twelve, thirteen, fourteen and fifteen of this Act, be deemed to be a payment of that part of the hire-purchase price.

NOTES TO SECTION 21

The Sale of Goods Act, 1893, will be found at p. 328, *post*. The definitions in the Sale of Goods Act of “ action ” and

"goods" refer also to Scotland, and of "warranty" to Scotland and Ireland. This Act does not apply to Scotland or Northern Ireland (section 22 (3)).

"Hire-Purchase Agreement." This definition seems to include both agreements to hire with an option to buy (*Helby v. Matthews*, [1895] A.C. 471; 3 Digest 93, 245) and agreements which amount to binding agreements to buy at the end of the hiring as in *Lee v. Butler*, [1893] 2 Q.B. 318; 3 Digest 92, 241. See p. 154, *ante*.

"Credit-sale agreement." See p. 275, *ante*.

"Hire-Purchase Price." This is a new and convenient statutory term of art which, however, in strictness only applies in agreements coming within the categories laid down in section 1 of the Act.

"Owner." Thus there may be more than one "owner" simultaneously for it is quite usual to assign the contractual rights under the agreement while retaining the property rights in the goods. (See p. 108, *ante*.)

"Contract of guarantee." It is important to observe the limitations of this definition. It frequently happens that a dealer guarantees the due performance of the hirer's obligations to the owner, *e.g.*, a finance company. The hirer is usually quite ignorant of this arrangement and cannot in any sense be said to have requested the dealer to guarantee. The dealer is not a guarantor and his contract with the owner is not a contract of guarantee, within the meaning of the Act.

"Motor vehicle," *i.e.*, a mechanically-propelled vehicle intended or adapted for use on roads. (See Road Traffic Act, 1930 (20 & 21 Geo. V, c. 41) section 1).

Subsection (2). This refers to transactions known as "part exchange" transactions where goods belonging to the hirer are "traded in."

22. Short title, commencement and extent.—

(1) This Act may be cited as the Hire-Purchase Act, 1938.

(2) This Act shall come into force on the first day of January nineteen hundred and thirty-nine.

(3) This Act shall not extend to Scotland or Northern Ireland.

SCHEDULE (Section 2)

NOTICE TO BE INCLUDED IN NOTE OR MEMORANDUM OF HIRE-PURCHASE AGREEMENT

NOTICE

Right of Hirer to terminate Agreement

1. The hirer may put an end to this agreement by giving notice of termination in writing to any person who is entitled to collect or receive the hire-rent.

2. He must then pay any instalments which are in arrear at the time when he gives notice. If, when he has paid those instalments, the total amount which he has paid under the agreement is less than (*here insert the minimum amount which the hirer is required to pay in accordance with the provisions of sections four and nineteen of this Act*) he must also pay enough to make up that sum.

3. If the goods have been damaged owing to the hirer having failed to take reasonable care of them, the owner may sue him for the amount of the damage unless that amount can be agreed between the hirer and the owner.

4. The hirer should see whether this agreement contains provisions allowing him to put an end to the agreement on terms more favourable to him than those just mentioned. If it does, he may put an end to the agreement on those terms.

Restriction of Owner's right to recover Goods

1.*[*After (here insert an amount calculated in accordance with the provisions of sections eleven and nineteen of this Act) has been paid, then,*] unless the hirer has himself put an end to the agreement, the owner of the goods cannot take them back from the hirer without the hirer's consent unless the owner obtains an order of the court.

2. If the owner applies to the court for such an order, the court may, if the court thinks it just to do so, allow the hirer to keep either—

- (a) the whole of the goods, on condition that the hirer pays the balance of the price in the manner ordered by the court ; or
- (b) a fair proportion of the goods having regard to what the hirer has already paid.

* If the agreement is a “further” agreement within the meaning of section fifteen of this Act, the words in square brackets should be omitted.

NOTES TO SCHEDULE

This schedule contains a notice which must be very carefully filled in. Two sums have to be computed—one in accordance with sections 4 and 19 of the Act and the other in accordance with sections 11 and 19 (unless the agreement is a “further” agreement within section 15). It is a trap to the unwary, particularly if sums in relation to installations, or to part exchange transactions have to be taken into account. Hire-purchase agreements should have notes in the margin to assist salesmen in ascertaining the sum to be filled in. As the Notice must be “in the terms prescribed,” presumably a failure to fill in the figures correctly would render the whole agreement unenforceable, unless dispensation were granted by the Court. See notes to Precedent No. 3, *post*, p. 373.

APPENDIX B

THE COUNTY COURT (No. 3) RULES, 1938. DATED
DECEMBER 12, 1938 (a)

S.R. & O., 1938, No. $\frac{1475}{L. 24}$

1.—(1) These Rules may be cited as the County Court (No. 3) Rules, 1938.

(2) An Order and Rule referred to by number in these Rules means the Order and Rule so numbered in the County Court Rules, 1936, as amended (b).

(3) A Form referred to by number in these Rules means the Form so numbered in Appendix A to the County Court Rules, 1936.

(4) The County Court Rules, 1936, as amended, shall have effect as further amended by these Rules.

2. In Order VII the following Rule shall be inserted after Rule 7 and shall stand as Rule 7A :—

“ 7A. **Hire-purchase.** Where a plaintiff claims the recovery of goods let under a hire-purchase agreement, he shall in his particulars state—

- (i) the date of the agreement and the parties thereto ;
and
- (ii) the goods claimed ; and
- (iii) the amount of the hire-purchase price ; and
- (iv) the amount paid by or on behalf of the hirer ; and
- (v) the date when the right to recover possession of
the goods accrued.”

(a) The passages which have particular reference to hire-purchase are marked by a rule in the margin.

(b) S.R. & O. 1936 (No. 626) I, p. 282, as amended by 1936 (No. 1312) I p. 655 ; 1937 (No. 239) p. 532 and 1938 Nos. 18 and 731.

3. Paragraph (4) of Rule 31 of Order VIII shall be revoked and the following paragraph shall be substituted therefor :—

“ (4) A successive summons shall not be issued after 3 months from the date of issue of the original summons :
Provided that—

- (a) where a default summons has been exchanged for an ordinary summons under Order X, Rule 8, the said period of 3 months shall run from the date of the exchange ; and
- (b) where leave has been given to serve the original summons out of England and Wales, the successive summons may be issued within 12 months of the issue of the original summons.”

4. The marginal note to Rule 6 of Order X shall stand as the marginal note to paragraph (2) of that Rule and the words “ Notice of acceptance ” shall be inserted as the marginal note to paragraph (1) of that Rule.

5. Rule 1 of Order XIII shall stand as paragraph (1) of that Rule and the following paragraph shall be inserted and shall stand as paragraph (2) of that Rule :—

“ (2) The jurisdiction of the court to hear and determine any application in the course of an action or matter before judgment may be exercised by the registrar, unless there is a provision to the contrary in any Act or Rule.”

6. Rule 18 of Order XVI shall be amended as follows :—

(a) Paragraphs (1) and (2) shall be revoked and the following paragraphs shall be substituted therefor :

“ (1) Notice of objection under section 44 of the Act to an action being tried in a county court shall be delivered to the registrar and to the plaintiff within 8 days of the service of the summons on the defendant, inclusive of the day of service.

(2) Where the plaintiff's claim exceeds £100, the registrar shall, unless the parties have agreed that the court shall have jurisdiction, annex to the summons and to every copy thereof to be served a notice in Form 99.”

- (b) The following paragraph shall be added after paragraph (4) and shall stand as paragraph (5):—

“ (5) This Rule shall apply with the necessary modifications to a counterclaim.”

7. Rule 3 of Order XXII shall be revoked and the following Rule shall be substituted therefor:—

“ 3. **Actions which may be entered.** The registrar may, subject to the last preceding Rule, enter or fix for hearing at a registrar's court any action which he may have jurisdiction to hear and determine :

Provided that where the sum claimed or the amount involved exceeds £10, and at the time of the entry of a plaint the registrar is informed or has reason to believe that the action is likely to be defended, the action shall be entered for a court to be held by the judge.”

8. Order XXIII shall be amended as follows:—

- (a) Rules 1 and 2 shall be revoked and the following Rules shall be substituted therefor:—

“ 1. **Hearing by registrar.**—(1) The registrar shall have power on the application of the parties and by leave of the judge to hear and determine any action or matter in which the sum claimed or the amount involved does not exceed £10.

(2) Nothing in this Rule shall prejudice any power conferred by any Act or Rule on the registrar to hear and determine any other action or matter.

2. **Where plaintiff does not appear.**—(1) If the plaintiff does not appear at the hearing of an action or matter, then, except as otherwise provided in this Rule, the proceedings shall be struck out, and where an order for costs is made against the plaintiff, the registrar shall send him a notice in Form 128.

(2) Where any proceedings have been struck out under this Rule, the court may reinstate them for hearing on the same or any subsequent day.

(3) Where the plaintiff does not appear at the hearing but the court has received from him an

affidavit which is admissible in evidence by virtue of any Act or Rule, the proceedings shall not be struck out but the plaintiff shall be deemed to have appeared at the hearing and to have tendered the evidence in the affidavit."

- (b) In paragraph (2) of Rule 4 the words "In an action founded on contract" shall be omitted, and after the word "may" the words "with the leave of the judge" shall be inserted.

9. Paragraph (3) of Rule 4 of Order XXIV shall be revoked and the following paragraph shall be substituted therefor :—

"(3) A judgment for delivery of goods shall be in such one of the Forms in the Appendix as is applicable to the case."

10. Order XXV shall be amended as follows :—

- (a) Rule 46 shall stand as paragraph (1) of that Rule and at the end of that paragraph the following words shall be added :—

"without any such notice as is required by Order XX, Rule 5, having been given."

- (b) The following paragraph shall be inserted in Rule 46 and shall stand as paragraph (2) of that Rule :—

"(2) If the judgment creditor does not appear at the hearing of the judgment summons, but the court has received from him an affidavit which is admissible in evidence under this Rule, he shall be deemed to have appeared at the hearing and to have tendered the evidence in the affidavit."

- (c) Rules 74 and 75 shall be revoked and the following Rules shall be substituted therefor :—

"74. **Delivery of goods.**—(1) A judgment or order for the delivery of goods may be enforced by warrant of delivery in one of the Forms prescribed by Rule 75 of this Order.

(2) Where a warrant of delivery is issued, the plaintiff shall, either by the same or a separate warrant of execution, be entitled to execution against the defendant's goods for any sum of money and costs awarded.

(3) Nothing in this Rule shall prejudice the power of the judge to enforce the judgment or order by attachment.

75. **Forms of warrant.**—(1) Where a judgment or order for delivery of goods does not give the defendant an option to retain the goods on payment of their value, and the defendant is in default, the plaintiff shall be entitled to the issue of a warrant in Form 202, or, if a sum of money or costs have been awarded and the plaintiff desires execution therefor by the same warrant, in Form 203.

(2) Where a judgment or order for the delivery of goods gives the defendant an option to retain the goods on payment of their value, and the defendant is in default, the plaintiff shall be entitled to the issue of a warrant in Form 204, or, if he so desires, a warrant in Form 202 or Form 203."

11. In Order XLVI the following Rule shall be added and shall stand as Rule 10 of that Order:—

" Hire-Purchase Act, 1938.

10.—(1) Notwithstanding anything in Order XIII, Rule 8, any application under section 12 (3) of the Hire-Purchase Act, 1938, may be heard and determined by the judge or by the registrar.

(2) In an action in which a postponed order under section 12 (4) of that Act has been made by the registrar, any application under section 13 of the said Act may be heard and determined by the registrar."

12. In paragraph (2) of Rule 37 of Order XLVII the following words shall be inserted:—

" and

(e) the costs of any affidavit under Order XX, Rule 3A."

13. In Rule 6 of Order XLVIII the words " by the Act or these Rules " shall be substituted for the words " by this Act."

14. In Form 8 and also in Form 11 the words " Questions 1,

2 and 3 must be answered " shall be omitted and the following words shall be substituted therefor :—

" Question 1 must be answered and if the answer is ' Yes,' Questions 2 and 3 must be answered."

15. Form 99 shall be revoked and the following Form shall be substituted therefor :—

" 99.

NOTICE TO BE ANNEXED TO ORDINARY OR DEFAULT SUMMONS
WHERE CLAIM EXCEEDS £100.

To the Defendant,

If you object to this action being tried in the County Court, you must, within eight days of the service of this summons on you inclusive of the day of service, deliver to the registrar of the court and to the plaintiff a notice in writing repeating the title of the action and the number of the plaint as given in this summons and stating that you object to this action being tried in the County Court. In that case the action will be transferred to the High Court."

16. Form 139 shall be numbered Form 139 (1) and the following Forms shall be inserted after Form 139 (1) and shall stand as Forms 139 (2), 139 (3), 139 (4) and 139 (5) respectively :—

" 139 (2).

JUDGMENT FOR DELIVERY OF GOODS UNDER PARAGRAPH (a)
OF SECTION 12 (4) OF THE HIRE-PURCHASE ACT, 1938.

[General Title—Form 1.]

(Seal.)

It is adjudged that the defendant[s] being in default under a hire-purchase agreement dated the day of 19 and made between , the plaintiff do recover against the defendant [insert name of hirer] the following goods of the plaintiff, being goods subject to the said agreement and wrongfully detained by the said defendant : [specify the goods which the court decides to have been detained] and do recover against the defendant[s] the sum of £ for costs [or his costs of this action to be taxed on scale].

And it is ordered that the defendant [insert name of hirer] do return the said goods to the plaintiff on or before the day of 19 , and that in default thereof a warrant of delivery do issue.

And it is further ordered that the defendant[s] do pay the

said sum of £ for costs [or the amount of the said costs when taxed] to the registrar of this court on or before the day of 19 , [or within 3 days after the date of taxation] [or by instalments of £ for every , the first instalment to be paid on the day of 19].

139 (3).

JUDGMENT FOR DELIVERY OF GOODS UNDER PARAGRAPH (b)
OF SECTION 12 (4) OF THE HIRE-PURCHASE ACT, 1938.

[General Title—Form 1.]

(Seal.)

It is adjudged that the defendant[s] being in default under a hire-purchase agreement dated the day of 19 and made between , the plaintiff do recover against the defendant [*insert name of hirer*] the following goods of the plaintiff being goods subject to the said agreement and wrongfully detained by the defendant; that is to say [*specify the goods which the Court decides to have been detained*] and do recover against the defendant[s] the sum of £ for costs [or his costs of this action to be taxed on scale].

And it is ordered that the defendant [*insert name of hirer*] do return the said goods to the plaintiff on or before the day of 19 , and that the plaintiff do recover against the defendant[s] the said sum of £ in respect of costs [or the amount of the said costs when taxed] and that the operation of this order be postponed on condition that the unpaid balance of the hire-purchase price, namely £ , is paid into court by instalments of for every , the first instalment to be paid on the day of 19 ; [*add any further conditions imposed by the Court*].

And it is ordered that the terms of the above-mentioned agreement be modified in the following respects:—

No sum except the instalments aforesaid shall be payable to the plaintiff in respect of the said agreement during the said postponement.

[*State any other respects in which the agreement is to be modified.*]

And it is ordered that in case default is made in payment of any instalment according to this order, a warrant of delivery do issue.

And it is further ordered that the defendant[s] do pay the said sum of £ for costs [or the amount of the said costs when taxed] to the registrar of this Court by instalments of for every , the first instalment to be paid days after the last instalment of the price is paid or the postponement of this order is revoked, whichever first occurs.

139 (4).

JUDGMENT FOR DELIVERY OF GOODS UNDER PARAGRAPH (c)
OF SECTION 12 (4) OF THE HIRE-PURCHASE ACT, 1938.

[General Title—Form 1.]

(Seal.)

It is adjudged that, the defendant[s] being in default under a hire-purchase agreement dated the day of 19 , and made between , the plaintiff do recover against the defendant [insert name of hirer] the following goods of the plaintiff being goods subject to the said agreement and wrongfully detained by the said defendant, that is to say [specify the goods of which the Court decides to order the return] and do recover against the defendant[s] the sum of £ for costs [or his costs of this action to be taxed on scale].

And it is ordered that the defendant [insert name of hirer] do return the said goods to the plaintiff on or before the day of 19 , and that in default thereof a warrant of delivery do issue.

And it is ordered that the defendant[s] do pay the said sum of £ for costs [or the amount of the said costs when taxed] to the registrar of this Court on the day of 19 , [or within 3 days after the date of taxation] [or by instalments of for every , the first instalment to be paid on the day of 19].

And it is further ordered that the plaintiff's title to the following goods be transferred to the defendant [insert name of hirer] that is to say [specify the remainder of the goods to which the agreement relates].

139 (5).

ORDER ON APPLICATION UNDER SECTION 13 OF THE HIRE-
PURCHASE ACT, 1938.

[General Title—Form 1.]

(Seal.)

It is ordered that in lieu of the conditions mentioned in the judgment in this action dated the day of 19 ,

the operation of the order therein shall be postponed on the following conditions, that is to say [*state the varied conditions*].

And it is ordered that the terms of the hire-purchase agreement referred to in the said judgment be further modified in the following respects [*state the respects in which the agreement is to be modified*].

Or It is ordered that the postponement of the operation of the order in the judgment in this action dated the day of 19 , be revoked and that the defendant [*insert name of hirer*] do return the goods specified in the judgment to the plaintiff on or before the day of 19 , and that in default thereof a warrant of delivery do issue.

And it is ordered that the do pay the sum of £ for costs [*or the amount of the cost of these proceedings when taxed*] to the registrar of this Court on the day of 19 , [*or within 3 days after the date of taxation*].

Or It is ordered that the defendant [*insert name of hirer*] do return the following goods to the plaintiff on or before the day of 19 . [*Specify the goods of which the Court decides to order the return*] and that in default thereof a warrant of delivery do issue.

And it is ordered that the do pay the sum of £ for costs [*or the amount of the costs of these proceedings when taxed*] to the registrar of this Court on the day of 19 , [*or within 3 days after taxation*] [*or by instalments of for every , the first instalment to be paid on the day of 19*].

And it is further ordered that the plaintiff's title to the following goods be transferred to the defendant [*insert name of hirer*] that is to say [*specify the remainder of the goods to which the agreement relates*]."

17. In Form 154 the words " at the court office at and not to the registrar of the County Court " shall be omitted.

18. We, the undersigned members of the Rule Committee appointed by the Lord Chancellor under Section 99 of The County Courts Act, 1934, having by virtue of the powers vested in us in this behalf made the foregoing Rules, do

hereby certify the same under our hands and submit them to the Lord Chancellor accordingly.

S. A. Hill Kelly.
T. Mordaunt Snagge.
Barnard Lailey.
William Procter.
Austin Jones.
J. Alun Pugh.
Gilbert Hicks.
H. A. Dowson.

Approved by the Rule Committee of the Supreme Court.

Claud Schuster,
Secretary.

I allow these Rules which shall come into force on the 14th day of December, 1938.

Dated the 12th day of December, 1938.

Maugham, C.

APPENDIX C

FACTORS ACT, 1889 [52 & 53 VICT. CH. 45]

ARRANGEMENT OF SECTIONS

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An Act to amend and consolidate the Factors Act.

[26th August 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

*Preliminary***1. Definitions.**—For the purposes of this Act—

- (1) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :
- (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :
- (3) The expression “goods” shall include wares and merchandise :
- (4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper’s certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :
- (5) The expression “pledge” shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability :
- (6) The expression “person” shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents

2. Powers of mercantile agent with respect to disposition of goods.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same ; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. Effect of pledges of documents of title.—A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Pledge for antecedent debt.—Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. Rights acquired by exchange of goods or documents.—The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. Agreements through clerks, &c.—For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. Provisions as to consignors and consignees.—

(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

*Dispositions by Sellers and Buyers of Goods***8. Disposition by seller remaining in possession.—**

Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

9. Disposition by buyer obtaining possession.—

Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. Effect of transfer of documents on vendor's lien or right of stoppage in transitu.—Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer

shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental

11. Mode of transferring documents.—For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12. Saving for rights of true owner.—(1) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

13. Saving for common law powers of agent.—The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

14. Répeal.—The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

15. Commencement.—This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16. Extent of Act.—This Act shall not extend to Scotland.

17. Short title.—This Act may be cited as the Factors Act, 1889.

SCHEDULE

Section 14.

ENACTMENTS REPEALED.

Session and Chapter	Title	Extent of Repeal
4 Geo. 4. c. 83.	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
6 Geo. 4. c. 94.	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39.	An Act to amend the law relating to advances bona fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39.	An Act to amend the Factors Acts.	The whole Act.

APPENDIX D

SALE OF GOODS ACT, 1893 [56 & 57 VICT. CH. 71]

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An Act for codifying the Law relating to the Sale of Goods.

[20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I

FORMATION OF THE CONTRACT

Contract of Sale

1. Sale and agreement to sell.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property :

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract

3. Contract of sale, how made.—Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4. Contract of sale for ten pounds and upwards.—

(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject matter of Contract

5. Existing or future goods.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Goods which have perished.—Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Goods perishing before sale but after agreement to sell.—Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part

of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price

8. Ascertainment of price.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. Agreement to sell at valuation.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties

10. Stipulations as to time.—(1) Unless a different intention appears from the terms of the contract stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale “month” means *prima facie* calendar month.

11. When condition to be treated as warranty.—(1) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated:

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to

a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract :

- (c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12. Implied undertaking as to title, &c.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Sale by description.—Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if

the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Implied conditions as to quality or fitness.—Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :
- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade :
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample

15. Sale by sample.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

- (a) There is an implied condition that the bulk shall correspond with the sample in quality :
- (b) There is an implied condition that the buyer shall

have a reasonable opportunity of comparing the bulk with the sample :

- (c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II

EFFECTS OF THE CONTRACT

Transfer of Property as between Seller and Buyer

16. Goods must be ascertained.—Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. Property passes when intended to pass.—

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Rules for ascertaining intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing

with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. Reservation of right of disposal.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his

agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Risk *prima facie* passes with property.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

Transfer of Title

21. Sale by person not the owner.—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22. Market overt.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. Sale under voidable title.—When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24. Revesting of property in stolen goods on conviction of offender.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25. Seller or buyer in possession after sale.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26. Effect of writs of execution.—(1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed ; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term “ sheriff ” includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III

PERFORMANCE OF THE CONTRACT

27. Duties of seller and buyer.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Payment and delivery are concurrent conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29. Rules as to delivery.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence : Provided that, if the contract be for the sale of specific goods, which to the knowledge of the

parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. Delivery of wrong quantity.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. Instalment deliveries.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect

of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32. Delivery to carrier.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Risk where goods are delivered at distant place.—Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34. Buyer's right of examining the goods.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for

the purpose of ascertaining whether they are in conformity with the contract.

35. Acceptance.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. Buyer not bound to return rejected goods.—Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them having the right to so do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. Liability of buyer for neglecting or refusing delivery of goods.—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods: Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

38. Unpaid seller defined.—(1) The seller of goods is deemed to be an “unpaid seller” within the meaning of this Act—

- (a) When the whole of the price has not been paid or tendered;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this Part of this Act the term “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. Unpaid seller's rights.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

- (a) A lien on the goods or right to retain them for the price while he is in possession of them ;
- (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them ;
- (c) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. Attachment by seller in Scotland.—In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or pouding ; and such arrestment or pouding shall have the same operation and effect in a competition or otherwise as an arrestment or pouding by a third party.

Unpaid Seller's Lien

41. Seller's lien.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

- (a) Where the goods have been sold without any stipulation as to credit ;
- (b) Where the goods have been sold on credit, but the term of credit has expired ;
- (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Part delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. Termination of lien.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

- (a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;
- (b) When the buyer or his agent lawfully obtains possession of the goods ;
- (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu

44. Right of stoppage in transitu.—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. Duration of transit.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. How stoppage in transitu is effected.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller

47. Effect of sub-sale or pledge by buyer.—Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by

way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48. Sale not generally rescinded by lien or stoppage in transitu.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V

ACTIONS FOR BREACH OF THE CONTRACT

Remedies of the Seller

49. Action for price.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. Damages for non-acceptance.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer

51. Damages for non-delivery.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. Specific performance.—In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. Remedy for breach of warranty.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (b) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Interest and special damages.—Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI

SUPPLEMENTARY

55. Exclusion of implied terms and conditions.—

Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between

the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Reasonable time a question of fact.—Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Rights, &c., enforceable by action.—Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. Auction sales.—In the case of a sale by auction—

- (1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale :
- (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid :
- (3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person : Any sale contravening this rule may be treated as fraudulent by the buyer :
- (4) A sale by auction may be notified to be subject to a reserve or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. Payment into court in Scotland when breach of warranty alleged.—In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. Repeal.—The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued

before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61. Savings.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. Interpretation of terms.—(1) In this Act, unless the context or subject matter otherwise requires,—

“ Action ” includes counterclaim and set off, and in Scotland condescendence and claim and compensation :

“ Bailee ” in Scotland includes custodier :

“ Buyer ” means a person who buys or agrees to buy goods :

“ Contract of sale ” includes an agreement to sell as well as a sale :

“ Defendant ” includes in Scotland defender, respondent, and claimant in a multiplepinding :

“ Delivery ” means voluntary transfer of possession from one person to another :

“ Document of title to goods ” has the same meaning as it has in the Factors Acts :

“ Factors Acts ” mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same :

“ Fault ” means wrongful act or default :

“ Future goods ” mean goods to be manufactured or acquired by the seller after the making of the contract of sale :

“ Goods ” include all chattels personal other than things

in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale :

“ Lien ” in Scotland includes right of retention :

“ Plaintiff ” includes pursuer, complainer, claimant in a multiplepounding and defendant or defender counter-claiming :

“ Property ” means the general property in goods, and not merely a special property :

“ Quality of goods ” includes their state or condition :

“ Sale ” includes a bargain and sale as well as a sale and delivery :

“ Seller ” means a person who sells or agrees to sell goods :

“ Specific goods ” mean goods identified and agreed upon at the time a contract of sale is made :

“ Warranty ” as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done “ in good faith ” within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a “ deliverable state ” within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. Commencement.—This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. Short title.—This Act may be cited as the Sale of Goods Act, 1893.

SCHEDULE

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. I. c. 21. -	- An Act against brokers. The whole Act.
29 Cha. 2. c. 3. -	- An Act for the prevention of frauds and perjuries. In part ; that is to say, sections fifteen and sixteen.*
9 Geo. 4. c. 14. -	- An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part ; this is to say, section seven.
19 & 20 Vict. c. 60. -	The Mercantile Law Amendment (Scotland) Act, 1856. In part ; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97. .	The Mercantile Law Amendment Act, 1856. In part ; that is to say, sections one and two.

* Commonly cited as sections sixteen and seventeen.

APPENDIX E

LAW OF DISTRESS AMENDMENT ACT, 1908 [8 EDW.7. CH. 53]

ARRANGEMENT OF SECTIONS

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An Act to amend the Law as regards a Landlord's right of Distress for Rent. [21st December 1908.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Under tenant or lodger, if distress levied, to make declaration that immediate tenant has no property in goods distrained.—If any superior landlord shall levy, or authorise to be levied, a distress on any furniture, goods, or chattels of—

- (a) any under tenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year

the full annual value of the premises or of such part thereof as is comprised in the under tenancy, or

- (b) any lodger, or
- (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to such superior landlord by his immediate tenant, such under tenant, lodger, or other person aforesaid may serve such superior landlord, or the bailiff or other agent employed by him to levy such distress, with a declaration in writing made by such under tenant, lodger, or other person aforesaid, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such under tenant, lodger, or other person aforesaid, and are not goods or live stock to which this Act is expressed not to apply; and also, in the case of an under tenant or lodger, setting forth the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorised to be levied have been paid off, and to such declaration shall be annexed a correct inventory, subscribed by the under tenant, lodger, or other person aforesaid, of the furniture, goods, and chattels referred to in the declaration; and, if any under tenant, lodger, or other person aforesaid, shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.

2. Penalty.—If any superior landlord, or any bailiff or other agent employed by him, shall, after being served with the before-mentioned declaration and inventory, and in the case of an under tenant or lodger after such undertaking as aforesaid has been given, and the amount of rent (if any) then due has been paid or tendered in accordance with that undertaking, levy or proceed with a distress on the furniture, goods, or chattels of the under tenant, lodger, or other person aforesaid, such superior landlord, bailiff, or other agent shall be deemed guilty of an illegal distress, and the under tenant,

lodger, or other person aforesaid, may apply to a justice of the peace for an order for the restoration to him of such goods, and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the under tenant, lodger, or other person aforesaid, in which action the truth of the declaration and inventory may likewise be inquired into.

3. Payments by under tenant or lodger to superior landlord.—For the purposes of the recovery of any sums payable by an under tenant or lodger to a superior landlord under such an undertaking as aforesaid, or under a notice served in accordance with section six of this Act, the under tenant or lodger shall be deemed to be the immediate tenant of the superior landlord, and the sums payable shall be deemed to be rent; but, where the under tenant or lodger has, in pursuance of any such undertaking or notice as aforesaid, paid any sums to the superior landlord, he may deduct the amount thereof from any rent due or which may become due from him to his immediate landlord, and any person (other than the tenant for whose rent the distress is levied or authorised to be levied) from whose rent a deduction has been made in respect of such a payment may make the like deductions from any rent due or which may become due from him to his immediate landlord.

4. Exclusion of certain goods.—This Act shall not apply—

- (1) to goods belonging to the husband or wife of the tenant whose rent is in arrear, nor to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant, nor to goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, nor to any live stock to which section twenty-nine of the Agricultural Holdings Act, 1908, applies;
- (2) (a) to goods of a partner of the immediate tenant;
 (b) to goods (not being goods of a lodger) upon premises where any trade or business is carried on in which

both the immediate tenant and the under tenant have an interest ; (c) to goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice (which shall be given in like manner as a notice to quit) to remove the goods and vacate the premises ; (d) to goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation :

Provided that it shall be competent for a stipendiary magistrate, or where there is no stipendiary magistrate for two justices, upon application by the superior landlord or any under tenant or other such person as aforesaid, upon hearing the parties to determine whether any goods are in fact goods covered by subsection (2) of this section.

5. Exclusion of certain under tenants.—This Act shall not apply to any under tenant where the under tenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant, or where the under tenancy has been created under a lease existing at the date of the passing of this Act contrary to the wish of the landlord in that behalf, expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge.

6. To avoid distress.—In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether the same has already accrued due or not, by such under tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent.

7. Commencement of Act.—This Act shall come into operation on the first day of July, one thousand nine hundred and nine.

8. Repeal of 34 & 35 Vict. c. 79.—The Lodgers' Goods

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Protection Act, 1871, shall, wherever and so far as this Act applies, be repealed as from the commencement of this Act.

9. Definitions.—In this Act the words “superior landlord” shall be deemed to include a landlord in cases where the goods seized are not those of an under tenant or lodger; and the words “tenant” and “under tenant” do not include a lodger.

10. Act not to extend to Scotland.—This Act shall not extend to Scotland and shall only apply in Ireland to a rent issuing out of lands or tenements situate wholly within the boundaries of a municipality or of a township having town commissioners.

11. Short Title.—This Act may be cited as the Law of Distress Amendment Act, 1908.

APPENDIX F

PRECEDENTS

No. 1

HIRE-PURCHASE AGREEMENT FOR TRANSACTIONS TO WHICH THE HIRE-PURCHASE ACT, 1938, DOES NOT APPLY (a).

AN AGREEMENT made the — day of —, 19—, between (*name, address and description of owner*) (hereinafter called "the owner" which expression shall where the context admits, include the successors in title of the owner), of the one part, and (*name, address and description of the hirer*) of the other part.

WHEREBY in consideration of the sum of £—— now paid by the hirer to the owner for the option to purchase herein contained for which credit will only be given if a purchase be effected in accordance with the terms of this agreement, and in consideration of the rent and terms and conditions herein contained, it is agreed as follows:—

1.—The owner agrees to let and the hirer agrees to hire (*description of the chattels*) (*or, if numerous, the chattels set out in the Schedule hereto*) hereinafter referred to as "the said chattels", of the agreed value of £—— upon the terms and conditions following:—

2.—(a) The hirer shall pay to the owner by way of rent for the said chattels so long as the hiring shall continue, the sum of—— (*rent*) per (*period*) punctually on the — day of each succeeding calendar month (*or as the case may be*) at the address for the time being of the owner whether previously demanded or not the first of such payments to be made on the — day of —.

(It may be desired to arrange for payment by reference to a schedule or for payment of interest on arrears or to have payments secured by bills of exchange, in which cases the following optional clauses may be utilised.)

(a) These precedents should be used with careful reference to the constantly recurring decisions on the subject of hire-purchase, any one of which might necessitate the re-drafting of some clause.

[(x) The hirer shall punctually pay to the owner at the owner's address by way of rent for the said chattels so long as the hiring shall continue and whether previously demanded or not, the sums mentioned in the first column of the Schedule hereto on the respective dates mentioned in the second column of the Schedule hereto.

THE SCHEDULE

(To be printed at the end or on reverse)

Amount of rent payable. Dates when payable.

(y) The monthly *(or as the case may be)* payments of rent for the said chattels as set forth in Clause 2 hereof, shall be secured by the delivery to the owner on the *(date)* of bills of exchange *(or promissory notes)* in the form and to the value set forth in the — Schedule hereto. Provided that such bills of exchange *(or promissory notes)* shall be by way of collateral security only and shall not be deemed to be conditional payment of the said monthly *(or as the case may be)* payments and the said monthly *(or as the case may be)* payments shall be deemed to be made at the date when the said bills of exchange *(or promissory notes)* are met and discharged.

And provided further that if the hiring be determined under Clause 5 (a) hereof the owner shall redeliver to the hirer any of the said bills of exchange *(or promissory notes)* accruing due after such determination, or if any such bills of exchange *(or promissory notes)* accruing due after such determination have been discounted, will fully indemnify the hirer in respect thereof.

(z) Provided that if default be made in payment of any instalment of rent under this Agreement, the hirer shall pay to the owner interest at the rate of 5 per cent. per annum on the amount from time to time in arrear until payment thereof or the determination of this Agreement under Clause 5 (b), but this clause shall not in any way prejudice the owner's strict rights under this Agreement to retake possession of the chattels or determine the hiring or this Agreement or otherwise.]

(b) The hirer shall keep the said chattels in his own custody and control in good and substantial order and repair and shall be responsible for all risks (damage by fire included) and will not remove the said chattels from his above address or other permitted address without the consent in writing of the owner (such consent not to be unreasonably withheld).

(c) The hirer shall not sell, assign, transfer, pledge, mortgage, let or otherwise deal with or part with the possession of the said chattels, or any interest in them, or in the option to purchase, or in this Agreement, or attempt so to do, or create or allow to be created any lien upon the said chattels whether for repairs or otherwise, or commit or suffer any act of bankruptcy or (if a company) enter into any voluntary or compulsory liquidation (not being a liquidation only for the purposes of reconstruction) or enter into any composition or arrangement with his creditors.

(d) The hirer shall duly and punctually pay or cause to be paid the rent, rates and taxes and other outgoings payable in respect of the premises where the said chattels may be and on demand show to the owner the receipts therefor, and keep the said chattels free from and not suffer them to be taken in any distress for rent or otherwise or any execution or other legal process.

(e) The hirer shall permit the owner and all persons authorised by the owner at all reasonable times to inspect the condition of the said chattels and for the said purpose to enter upon the premises where the said chattels may be.

(In some cases it is desirable to provide for the insurance of the hired chattels when the following clause may be used.)

[(f) The hirer shall immediately after the signing of this Agreement insure and keep insured during the period of the hiring the said chattels against loss or damage by fire to the value of ———, in the name of the owner (or in the joint names of the owner and hirer) with the (name of Insurance Company) or with some Insurance Company to be approved by the owner, and will punctually pay all premiums and other sums required for keeping the said insurance effective, (and will hand over to the custody of the owner the insurance policy and all receipts for premiums) (or will at all times on demand produce for the inspection of the owner the policy of insurance and all receipts for premiums).

Provided that in case the hirer shall at any time fail to effect or keep effective the said policy by making default in payment of any premium or in any other way, the owner shall be entitled to effect such insurance and pay such premiums, and the hirer shall forthwith pay to the owner all premiums and other sums so paid by the owner and any costs and expenses occasioned by the hirer's default in effecting or keeping effective the insurance.

Provided further, that if the said chattels shall be destroyed

or damaged by fire, the owner shall be entitled to and shall be paid each and every sum recoverable by the assured under the said policy, and the hirer will forthwith pay the said sums to the owner if received by the hirer from the said Insurance Company, provided that the owner agrees to give the hirer credit for all sums paid by the said Insurance Company, as against the sum recoverable by the owner against the hirer in respect of the loss/or damage to the said chattels.

(The following is an alternative simpler form.)

The said chattels shall immediately on the signing of this Agreement be insured and kept insured by the owner at the hirer's expense in the joint names of the hirer and owner against all such risks as the owner shall reasonably require and the insurance premiums shall be paid by the hirer to the owner as and when they become due and payable to the Insurance Company, and the hirer shall not commit or suffer any act which might invalidate such insurance. If the hirer, having duly complied with all the terms and conditions of the Agreement, shall become the owner of the said chattels under the terms hereof, the owner will transfer to the hirer the benefit of the policy of insurance herein referred to.]

3.—If the hirer having duly kept and observed the terms of this Agreement shall duly pay such instalments of rent as with the sum paid for the option to purchase shall in the aggregate amount to £———, or if at any time this agreement having been duly kept and observed by the hirer, the hirer shall pay such sum as with the payments already made shall amount to ———, (and in each of such cases credit will be given for the sum paid on the signature hereof for the option to purchase) this Agreement shall determine and the hirer shall become the absolute owner of the said chattels, but until such time the said chattels shall remain the sole property of the owner, and the hirer a mere bailee thereof.

4.—The hirer may at any time put an end to the hiring by delivering up the said chattels to the owner, at the owner's address, and at the hirer's risk and expense, but the hirer shall in that event remain liable for all arrears of hire and damages for breach of this Agreement or otherwise.

(If it is desired to provide against a return by the hirer before a given date, the following words may be added :)

[but if the hirer shall return the said chattels under this clause or if the owner shall retake possession of the said chattels under Clause 5 (a) hereof before the expiration of ——— months from the date hereof, the hirer shall pay such further

sum, as with the payments already made shall equal the sum of £———, by way of compensation for the depreciation of the said chattels.]

5.—If the hirer commit any breach of this Agreement, or commit any act of bankruptcy or do or permit any act or thing upon which an act of bankruptcy may be founded or construed, or if a receiving order in bankruptcy be made against the hirer, or if the hirer (being a limited company) enter into compulsory or voluntary liquidation, (not being a voluntary liquidation only for the purposes of reconstruction) or do any act or thing upon which an order for compulsory liquidation may be made, or if a distress be levied or threatened upon the said chattels or upon the premises where the said chattels may be, or if the said chattels be seized or taken in execution, or if the hirer permit any judgment to remain unsatisfied, then and in each and every of such events, the owner may :—

(a) without prejudice to the owner's claim for arrears of instalments of rent or damages for breach of this Agreement, forthwith without notice terminate the hiring and retake possession of and remove the said chattels ;

(b) and/or by written notice either served personally on the hirer or sent (by post or otherwise) to the hirer or to the hirer's last known address, forthwith and for all purposes absolutely determine and end this Agreement and the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the said chattels with the owner's consent, nor shall either party thereafter have any rights hereunder but such determination shall not discharge any pre-existing liability of the hirer to the owner.

6.—If the hiring be determined by the owner under clause 5 (a) hereof the hirer shall immediately return the said chattels to the owner, at the cost of the hirer, and the owner and his servants and agents shall be entitled (and irrevocable leave and licence is hereby given to the owner by the hirer for that purpose) without any notice to enter upon any premises which the hirer may enter or where the goods may be or may be supposed to be and seize and take possession of the said chattels and the hirer shall remain liable to the owner for all arrears of hire to the date of the determination of the hiring (apportioned if necessary), and damages in respect of breaches of this Agreement, and shall pay to the owner all costs and expenses and charges incurred by reason of such seizure and taking possession aforesaid.

7.—No neglect or delay or indulgence on the part of the owner in enforcing any terms or conditions of this Agreement, and no consideration for or forbearance or granting of time to the hirer by the owner shall be or be deemed to be a waiver of any breach by the hirer of any term of this Agreement, or prejudice the strict rights of the owner hereunder.

As witness the hands of the said parties :—

Owner's Signature. For and on behalf of (*name of owner*)

Witness to Owner's Signature.

Witness to hirer's signature. *Hirer's signature.*

Address. *Hirer's occupation.*

6d. Stamp if £5 or over.

THE FOLLOWING ADDITIONAL OR ALTERNATIVE CLAUSES MAY
BE FOUND USEFUL UNDER CERTAIN CIRCUMSTANCES

I. DEATH

In the event of the hirer's death (if the hirer be a man, widow or spinster) or (if the hirer be a married woman substantially dependent upon her husband), then in the event of the death of the hirer's husband, during the currency of the agreement, the owner agrees to release the hirer's estate or the hirer as the case may be, from all further liability under this agreement, provided always that all the terms and conditions of this agreement have been duly fulfilled by the hirer to the date of death, that the death arises solely from natural causes or through accident, that at the date hereof the hirer or the hirer's husband (as the case may be) is not suffering from or subject to any serious disease or malady, and that the death is proved to the satisfaction of the owner.

II. UNEMPLOYMENT, ILLNESS OR ACCIDENT

If the hirer shall satisfy the owner that owing to unemployment, serious illness or accident arising after the making of this agreement, he (or she) is unable to continue the payments due under this agreement, and provided always that there has been no breach by the hirer of this agreement except the non-payment of the hire-rent, the owner will select from

the chattels in the Schedule hereto articles to the value of the amount paid by the hirer under this agreement, (less a reasonable sum for the cost of delivery from and to the hirer's premises and for the depreciation of the remaining articles) and thereupon the hirer may return such remaining articles to the owner in full discharge of all remaining liability under this agreement, and upon such return the articles so selected by the owner for the hirer shall become the property of the hirer. The decision of the owner on all matters arising out of this clause shall be final, and nothing in this clause contained shall alter or prejudice the owner's rights as to the remainder of this Agreement.

III. WARRANTIES

The owner, not being the manufacturer, does not supply the said chattels or any of them subject to any condition or warranty, express or implied, as to quality, description, suitability, fitness or otherwise.

IV. MOTOR CARS

(a) **Licences.**—The hirer shall pay all licence duties, fees and registration charges payable in respect of the said car, and if any such duties, fees or charges shall have been paid by the owner, shall forthwith repay the same, and shall not use or suffer the said car to be used in any way contrary to law, and shall not take or send the said car out of Great Britain unless the written permission of the owner be first obtained.

(b) **Registration Marks.**—The hirer shall not during the hiring alter, remove, erase, conceal, deface or otherwise interfere with, the chassis, engine or registration marks, numbers, name or any trade mark or identification mark upon the said car, or permit any person to do so.

(c) **Repairs.**—The hirer shall not have or be deemed to have any authority to pledge the owner's credit for repairs or any other thing or to create a lien for repairs or any other purpose. If the said car shall require to be repaired the hirer shall notify the owner, who shall be entitled to repair the said car or have the same repaired by a person to be selected by the owner, at the expense of the hirer.

(It is not suggested that in view of the present state of the law, this clause will protect the owner from the creation of a lien for repairs but it may have the effect of deterring the hirer from creating a lien.)

No. 2

FORM OF PROPOSAL AND HIRE-PURCHASE AGREEMENT, IN CASES WHERE THE TRANSACTION IS CARRIED THROUGH BY A FINANCE COMPANY ON THE INTRODUCTION OF A DEALER (a)

(N.B.—Not to be used in cases within the Hire-Purchase Act, 1938.)

PROPOSAL FORM.

A.

To Messrs. (*name of finance company*)
of (*address*)

DEAR SIRs,

Please supply me with the (*describe chattels or say—with the chattels specifically set out in the Schedule hereto*) upon the terms and conditions of the hire-purchase Agreement annexed hereto. I submit herewith the undermentioned information which I declare to be true and which I agree to accept as the basis upon which the said Agreement shall be made if this proposal is accepted by you. If the proposal is not accepted, you undertake to return the sum now paid within——days.

Yours faithfully,

(*Signature of Proposer*).

THE SCHEDULE.

B.

Part 1.—(*Description of chattels.*)

Part 2.—Payment for option to purchase £ s. d.

Part 3.—(*Particulars of amount of monthly payment and date of payments.*)

Part 4.—(*Number of monthly payments in addition to amount paid for option before purchase complete.*)

Part 5.—Agreed value of chattels £ s. d.

Part 6.—Address to which chattels to be delivered and kept.

INFORMATION.

C.

Full name of applicant.

(If a lady, state whether single, married or widow; if married, state husband's occupation.)

Name and address of employer.

(For our records only. We do not communicate with employer.)

(a) The four documents can conveniently be printed on one four paged double sheet,

State if householder.

(If not, give two references, banker, or tradesman. If yes, state for how long and at what address.)

State if over 21.

(If under 21 give name and address of guarantor who must sign guarantee form to be provided.)

DEALER'S OR AGENT'S STATEMENT.

D.

To (*name of Finance Company*).

I have satisfied myself to the best of my ability that the above information is correct and that the proposer is a respectable and responsible person, and I recommend the acceptance of the above mentioned proposal. I undertake to indemnify you against the non-payment by the hirer of any sum due under the proposed hire-purchase Agreement. I have accordingly obtained the hirer's signature to the said proposed agreement, and I have received the sum of £——, payable under Clause 1 (a) of the said agreement.

Date

Signature

Sixpenny
Stamp

HIRE-PURCHASE AGREEMENT.

E.

(The agreement may take the form of precedent No. 1 with the necessary consequential amendments or the following shorter form may be suitable.)

THIS AGREEMENT made the — day of — 19—, between (*name and address of finance company*) (hereinafter called "the owners," which term shall include the successors in title of the owner) and (*name and address of hirer*) (hereinafter called "the hirer").

Witnesseth that the owners agree to let and the hirer agrees to hire the chattels more particularly described in Part I of the Schedule on page 1, hereof, (hereinafter referred to as "the said chattels") on the following terms and conditions,

1.—The hirer shall pay to the owners :

(a) On the signing hereof the sum shown in Part II of the Schedule hereto in consideration of the option to purchase the said chattels hereby granted.

(b) During the continuance of the hiring the (*period*) rent shown in Part III of the said Schedule on the dates specified therein.

2.—The said chattels shall become the property of the hirer when all the payments shown in Parts II and III of the Schedule have been duly paid, (provided always that the terms and conditions of this Agreement have in the meantime been duly kept and observed) but until such time the said chattels shall be and remain the sole property of the owner and the hirer a mere bailee thereof.

3.—During the hiring, the hirer shall keep the said chattels in good order and condition and repair (damage by fire included) and at the hirer's address as shown in Part VI of the Schedule hereto, where the said chattels may be inspected by the owner and/or his servants or agents at all reasonable times, and shall punctually pay or cause to be paid the rent, rates, taxes and other outgoings payable in respect of the said premises and on demand show to the owners the last receipts therefor.

4.—The hirer shall not sell, assign, transfer, pledge, mortgage, let or otherwise deal with or part with the possession of, or remove the said chattels or any of them or the benefit of this Agreement or the option to purchase hereby granted or attempt so to do, nor commit or suffer any act of bankruptcy nor enter into any composition or arrangement with his creditors, nor suffer the said chattels to be seized under distress for rent, rates, taxes or any execution or other legal process.

5.—The hirer may at any time terminate the hiring by returning the said chattels in good order and condition and at his own expense to the owner.

6.—Should the hirer commit any breach of any term or condition of this Agreement, it shall be lawful for the owners :
(a) without prejudice to any of their rights hereunder forthwith and without notice to terminate the hiring and retake possession of the said chattels and for such purpose leave and licence is hereby given by the hirer to the owner and his representatives to enter the premises where the said chattels may be or may be supposed to be ; (b) alternatively,

by written notice either served personally on the hirer or sent (by post or otherwise) to or left at the hirer's last known address, forthwith and for all purposes absolutely to determine and end this Agreement and the hiring hereby constituted, and thereupon the hirer shall no longer be in possession of the said chattels with the owner's consent, nor shall either party thereafter have any rights hereunder, but such determination shall not discharge any pre-existing liability of the hirer to the owner.

7.—Should the hiring be determined under Clause 5 or Clause 6 (a) hereof, the hirer shall remain liable to the owners for any arrears of rent or other sums due under this Agreement and damages for breach thereof, and for any expense incurred by the owner in retaking or recovering or receiving the said chattels, together with such further sum as may be required to make the amount paid under Clause 1 (b) hereof equal to three months' rent.

8.—The owner, not being the manufacturer, does not supply the said chattels or any of them subject to any condition or warranty express or implied, as to quality, description, suitability, fitness or otherwise.

9.—No relaxation, delay or indulgence on the part of the owner in enforcing any terms or conditions of this Agreement shall prejudice the strict rights of the owner, or operate as notice or waiver of any breach of this Agreement.

10.—The hirer agrees that this Agreement is signed subject to the owner's acceptance of the hirer's proposal on page 1 hereof.

As witness the hands of the parties

Owner's Signature.

For and on behalf of

Signed by the hirer.

6d. Stamp if
£5 or over.

Witness of Hirer's signature.

Address of witness.

Occupation.

(The guarantee should preferably be on a separate form and may be in the form of Precedent No. 5.)

No. 3

HIRE-PURCHASE AGREEMENT FOR TRANSACTIONS TO WHICH
THE HIRE-PURCHASE ACT, 1938, APPLIES (a)

MEMORANDUM OF AGREEMENT made the — (b) day of — 19—, between (*name, address and description of owner*) hereinafter called "the owner" which expression shall where the context admits, include the successors in title of the owner) of the one part, and (*name, address and description of the hirer*) of the other part (c).

WHEREBY the owner agrees to let and the hirer agrees to hire the goods set out in the Schedule hereto (hereinafter referred to as "the said goods") upon the following terms and conditions:—

1. The hirer shall pay to the owner on the date of signature hereof by the hirer the sum of £—— in consideration of the option to purchase hereby given [the said sum to include £—— the value of goods taken in part payment,] and shall pay at the owner's above mentioned address by way of hire-rent for the said goods so long as the hiring shall continue, the sum of £—— per month punctually on the——day of each succeeding calendar month (*or as the case may be*) (d) until (including the sum paid for the option to purchase hereby given) the sum of £—— (hereinafter called the Hire-Purchase Price) has been paid. [The Hire-Purchase Price includes the sum of £—— being the amount to be paid by the hirer in payment of the installation which the owner is required to carry out.]

2. (*As in 2 (b) of Precedent No. 1, substituting the word "goods" for chattels for conformity with the word used in the schedule to the Act. This should be done in all cases where clauses are taken from Precedent No. 1.*)

3. (*As in 2 (c) of Precedent No. 1.*)

4. (*As in 2 (d) of Precedent No. 1.*)

(a) See s. 1 of Act, p. 273 *ante*.

(b) A copy of the agreement must be delivered or sent to the hirer within 7 days of this date. A receipt should be obtained.

(c) If a guarantor is a party to the agreement and does not guarantee by separate document there must be the necessary alteration in the description of parties and an additional clause, being a modification of Precedent No. 5.

(d) The date of payment of each instalment must be stated or it must be possible to determine the date from the words used (s. 2 (2) (b)).

5. (*As in 2 (e) of Precedent No. 1.*)

6. (*An insurance clause as in Precedent No. 1, clause 2 (f) or some variation of it.*)

7. [The owner shall carry out all necessary works and installations necessary to put the goods into proper working order on the hirer's above mentioned premises (e).]

8. [The hirer may without prejudice to the hirer's right to determine the agreement as set out in the Notice hereto, determine the hiring at any time by delivering up the said goods to the owner at the owner's address, but in such case the hirer shall remain liable for any arrears of hire-rent and for any damage to the said goods (f).]

9. (*As in Precedent No. 1, clause 5, up to "in each and every of such events" then continue as follows*) the owner shall be entitled to immediate possession of the said goods and may:—

(a) without prejudice to the owner's claim for arrears of hire-rent or for damages for breach of this Agreement (if any) forthwith without notice terminate the hiring and (if one-third of the Hire-Purchase Price has not been paid and subject to the Hire-Purchase Act, 1938) retake possession of the said goods; and/or

(b) by written notice (*continue as in Precedent 1, clause 5 (b).*)

10. If the hirer (having meanwhile duly kept and observed all the terms and conditions of this agreement) shall pay such sum as with the sums already paid for the option to purchase and as hire-rent shall amount in the aggregate to the Hire-Purchase Price, this Agreement shall determine and the hirer shall become the absolute owner of the said goods, but until such time the said goods shall remain the sole property of the owner and the hirer a mere bailee thereof.

11. If the hiring shall be determined under clause 9 (a) by the owner [or under clause 8 by the hirer] the hirer shall pay in addition to sums already paid the amount by which one-half of the Hire-Purchase Price exceeds the total of the sums paid and the sums due in respect of the Hire-Purchase Price immediately before the termination.

[12. The said goods are supplied by the owner to the

(e) See s. 19 and clause 1 above. The benefit of this clause is only obtained where the owner is required by the agreement to carry out any installation.

(f) This clause is not essential, but may be thought convenient to cover cases where a hirer returns goods without the formality of a written notice of termination.

13. (As in Precedent No. 1, clause 7.)

SCHEDULE

NOTE.—The price(s) at which the hirer might have purchased the said goods for cash immediately before entering into this agreement are shown in the Cash Price Column.

(Pursuant to Hire-Purchase Act, 1938)

1. (Set out as in Act.)

(g) Delete if not required. It is not suggested that there is much value in the clause in view of the wording of section 8.

(h) This must be sufficient to identify the goods.

(i) Delete where not applicable.

3. (*Set out as in Act.*)
4. (*Set out as in Act.*)

RESTRICTION OF OWNER'S RIGHT TO RECOVER GOODS

1. (*Set out as in Act except that the words in italics should be omitted and the calculated figure inserted. In the normal case it will be one-third of the Hire-Purchase Price, but if there are installation charges, the figure must be calculated in accordance with sections 11 and 19. If the agreement is a "further" agreement within section 15, no calculation is needed as the words in square brackets must be struck out. It may be as well to put a note in the margin to explain what a further agreement is, and also to give a reference to the sections of the Act referred to in this part of the Notice.*)

2. (*Set out as in Act.*)

(NOTE.—It is suggested that the words printed at the end of the Notice with an asterisk are not intended to be included in the agreement as they are obviously an instruction. They might be better in italics.)

As Witness the hands of the parties :—

Signature of hirer in person (k).

6d. Stamp if
£5 or over.

Witness to hirer's signature.

Address.

Occupation.

Signature of owner.

Witness to owner's signature.

Address.

Occupation.

No. 4

CREDIT SALE AGREEMENT (under which total purchase price exceeds £5) (*kk*)

(Within the Hire-Purchase Act, 1938)

THIS AGREEMENT made the (a) — day of —

(*k*) The hirer must sign personally.

(*kk*) It would appear that this agreement should be stamped with an impressed stamp *ad valorem*. See Stamp Act, 1891, First Schedule; and see *ante*, p. 19.

(*a*) A copy of this agreement must be delivered or sent to the buyer within 7 days of this date.

19—, between ——— of ——— (hereinafter called "the Seller") of the one part and ——— of ——— (hereinafter called "the Buyer") of ——— of the other part.

WITNESSETH that the Seller agrees to sell and the Buyer agrees to buy the goods mentioned in the Schedule hereto annexed (hereinafter referred to as "the said goods") for the sum of £—— (hereinafter referred to as "the total purchase price") payable by the following instalments and on the following terms and conditions.

1. The Buyer will pay on the signing of this Agreement the sum of £—— and the balance by (b) —— equal monthly instalments of £—— payable on the —— day of each month, the first of such payments to be made on the ——.

2. The Buyer will make the said payments at —— by post or otherwise but if sent by post the payments will be at the Buyer's sole risk.

3. If the Buyer make default in the payment of any one instalment for more than (c) —— days the whole of the balance then outstanding shall become immediately due and payable forthwith.

4. The Seller will deliver the said goods to the Buyer within 7 days of the date hereof.

5. This Agreement is not subject to cancellation by the Buyer and any indulgence shown to the Buyer by the Seller shall not prejudice the Seller's strict rights.

SCHEDULE

NOTE. The Price of these goods if purchased for cash is £

Description of Goods (d).

Witness to signature of Buyer.

Signature of Buyer in person.

Address.

Witness to signature of Seller.

Signature of or on behalf of Seller.

Address.

RECEIPT. I acknowledge having received a true copy of the above agreement this day of 19 .

Signature of Buyer in person.

(b) Insert number.

(c) Insert number.

(d) This must be sufficient to identify the goods.

No. 5

GUARANTEE FOR DUE PERFORMANCE BY HIRER OF
A HIRE-PURCHASE AGREEMENT

To *(name, address and description of owner)*.

In consideration of your delivering or redelivering *(as the case may be)* on hire at my request to *(name, address and description of hirer)* (hereinafter called the hirer) a *(description of the chattels or—the goods and chattels more particularly described in the Schedule to the hire-purchase agreement proposed to be made between you and the hirer), (or if it is a case of redelivering after a retaking, the agreement should be identified)—or simply* In consideration of your agreeing to deliver at my request goods on a hire-purchase agreement to *(hirer)*, I the undersigned *(name, address and description of guarantor)* hereby guarantee the due payment by the hirer of each and every sum, that shall from time to time become due under the said agreement and the due performance by the hirer of each and every term and condition of the said agreement, and I hereby agree to pay you all sums which may become payable to you by the hirer and are not paid by reason of any breach by the hirer of the terms and conditions of the said agreement, whether in respect of rent, expense, damage, costs or otherwise, and I further agree and declare that the granting by you to the hirer of any time, forbearance or indulgence or the making by you of any composition with the hirer with reference to the said agreement or any waiver or variation by you of the terms of the said agreement, shall not discharge my liability under this Guarantee.

Dated.

Signature of Guarantor.

Sixpenny
Stamp.

Witnessed by
Address

Address of Guarantor.

No. 6

DECLARATION

UNDER THE
LAW OF DISTRESS AMENDMENT ACT, 1908

I, (*name, address and business of owner. If owner is a company the declaration should be made by an officer of the company, duly authorised and if a firm, by a partner therein, and the person so making the declaration should here state his position in the company or firm*), pursuant to the Law of Distress Amendment Act, 1908, do hereby declare, that your immediate tenant of the premises at (*description or address*) has no right of property or beneficial interest in the furniture, goods and chattels described in the inventory hereto and which have been distrained (*or threatened to be distrained*) upon. And I further declare that such furniture, goods and chattels are my property (*or are the property of the above-named company or firm (as the case may be)*) and are not goods, or livestock to which the said Act is expressed not to apply. (*In the case of a company add—and I am duly authorised by the said company to make this declaration.*)

Dated.

Signed.

To the landlord, and his agent and bailiff.

(The inventory which may be on the back of or annexed to the declaration should, it is suggested, be subscribed by the declarant, although it appears, in view of the decision in Godlonton v. Fulham & Hampstead Property Co., [1905] 1 K.B. 431; 18 Digest 307, 432, not to be strictly necessary.)

No. 7

INDORSEMENT OF WRIT UNDER O. 3, r. 6

1.—Hire of Goods.

The plaintiff's claim is for £—— for the hire of (——) (under an agreement (*date*)).

2.—Detinue.

The plaintiff's claim is for an order for the return of (*or delivery up of*) a (*describe goods*) (*or its value*) and £——

for the hire thereof from ——— to ——— at ——— per ———,
and ——— damages for its wrongful detention (a).

No. 8

INDORSEMENTS OF ORDINARY WRIT (b)

(a) Detinue.

The plaintiff's claim is for an order for the return of (or delivery up of) a (*describe goods*) or its value and damages for wrongful detention (or wrongfully detaining the same).

(b) Conversion.

The plaintiff's claim is for damages for wrongfully depriving the plaintiff of (*describe goods*) (or for the wrongful conversion of (*describe goods*)).

(c) Distress.

The plaintiff's claim is for damages for improperly distraining. (*No. 6, (a), (b), and (c) can be indorsed on one Writ in the alternative if necessary.*)

(d) Trespass to goods.

The plaintiff's claim is for damages for trespass to plaintiff's (*describe goods*).

(e) Trespass to land.

The plaintiff's claim is for wrongfully breaking and entering the plaintiff's land or premises (*describe*) and (*describe shortly act of trespass, e.g., damaging plaintiff's doors and windows, injuring plaintiff's furniture*).

(a) If judgment be obtained under O. 14, it will be in interlocutory form so far as any damages awarded is concerned, and a writ of enquiry will issue to assess damages (O. 14, r. 7a). Where the plaintiff is not seeking to recover the specific chattel or where the Court does not choose to make an order for the delivery up of the specific chattel without giving the defendant the option of retaining it on paying the assessed value (O. 14, r. 1 (c)), the judgment will be for the delivery up of the chattel or its value to be assessed and a writ of enquiry will issue as above.

(b) It is not proposed to give here precedents of statements of claim and other pleadings for which reference should be made to the appropriate textbooks or the *Encyclopædia of Court Forms*.

No. 9

UNDERTAKING BY LANDLORD NOT TO DISTRAIN ON HIRED
GOODS (c)

To——.

I —— of —— in consideration of your having with my request agreed by an agreement in writing dated —— to lend on hire to —— of —— who holds the said premises —— aforesaid as my tenant the goods specified in the schedule to the said agreement do hereby undertake that I will not distrain on seize or sell the said goods or cause or suffer any other person or persons for me or on my behalf to distrain or seize or sell the same for rent in arrear or otherwise and will not prevent you from or obstruct you in removing the said goods whenever you think it desirable so to do.

AS WITNESS, ETC.

(Signature of Landlord.)

Dated the ——.

(a) This Precedent is taken from *The Encyclopædia of Forms and Precedents* (Second Edition), Vol. 7.

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